

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 48

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LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, PETITIONER,

*vs.*

W. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, TRADING AS ADAMS TRANSFER CO., H. L. BASS, AS BASS BUS LINE, ET AL.

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WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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PETITION FOR CERTIORARI FILED APRIL 9, 1941.

CERTIORARI GRANTED MAY 26, 1941.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, PETITIONER,

*vs.*

A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, TRADING AS ADAMS TRANSFER CO., H. L. BASS, AS BASS BUS LINE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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[fol. 1] **IN SUPERIOR COURT OF FULTON COUNTY****BILL OF EXCEPTIONS—Filed September 17, 1940**

Be It Remembered that at the July Term, 1940, of the Superior Court of Fulton County, there came on to be heard before the Honorable Paul S. Etheridge, Judge of said Court then presiding, the case of Louis H. Pink, Superintendent of Insurance of the State of New York, versus A. A. A. Highway Express, Inc. and others, being Case No. 127387 in said Court, on the demurrers of the defendants to the plaintiff's petition as amended.

Be It Further Remembered that after hearing argument of Counsel, the Court, on the 22d day of August, 1940, entered an order and judgment sustaining defendants' demurrers and dismissing said suit, which order was amended and supplemented on August 23, 1940, said order and judgment being, in part, in the following language:

" \* \* \* it is considered, ordered, and adjudged that the petition as amended fails to set forth a cause of action, it being the judgment of the Court that said petition fails to make out a case of liability for assessment against the several defendants. The general demurrers are therefore sustained, and the plaintiff's petition is dismissed."

To this ruling, order and judgment of the court, as originally entered and as amended, the plaintiff then and there excepted and now excepts, and assigns said ruling, order [fol. 2] and judgment as error and says that the court erred in sustaining the defendants' general demurrers upon the ground that the said ruling, order and judgment were contrary to law, and insists that said demurrers should have been overruled.

And now comes the plaintiff in said case, Louis H. Pink, Superintendent of Insurance of the State of New York, and names himself as plaintiff-in-error in this bill of exceptions, and names the following parties as defendants-in-error in this bill of exceptions:

A. A. A. Highway Express, Inc.

Service Coach Line, Inc.

H. A. Adams, trading as Adams Transfer Co.

East and West Motor Lines, Inc.

H. L. Bass, as Bass Bus Line.

Roy H. Reagin.

Georgia Motor Express, Inc.

S. S. Sale, Sale Transfer Co.

Southeastern Stages, Inc.

Everready Cab Company.

J. H. Booker, d/b/a Savannah Beach Line and/or Atlantic Stages.

Fletcher T. Kaylor, d/b/a Kaylor Transfer Co.

J. T. Murray, d/b/a Georgia Alabama Coach Line.

Kaler Produce Company.

Cox Bros. Undertaking Co., Inc.

Atlanta Macon Motor Express, Inc.

Southeastern Motor Lines, Inc., and/or Cedartown Bus Line.

J. Russell, d/b/a Russell Transfer Co.

Continental Carriers, Inc.

Bateman Company, Inc.

Downie Brothers Circus.

Kinnett Odom Company, Inc.

Southern Stages, Inc.

Weathers Bros. Transfer Co., Inc.

Within sixty days from the date of the aforesaid judgment, the Court not having adjourned within thirty days from the organization and opening of court for said July term, 1940, plaintiff-in-error presents this bill of exceptions to the Honorable Paul S. Etheridge, Judge of said Court, who presided in said cause, and prays that the same be certified to the Supreme Court of Georgia, that the errors [fol. 3] herein complained of may be corrected.

Plaintiff-in-error specifies as material to a clear understanding of the errors complained of the following portions of the record, to-wit:

(1) The original petition of the plaintiff, omitting process and filing.

(2) Amendment to plaintiff's petition, allowed June 21, 1940.

(3) Amendment to plaintiff's petition, allowed July 25, 1940.

(4) Amendment to plaintiff's petition, allowed August 14, 1940.

(5) Amendment to plaintiff's petition, setting up copy of form of policy, allowed August 14, 1940, filed August 26, 1940.

(6) The general demurrers of Service Coach Line, Inc. filed October 24, 1939, omitting paragraphs 4 and 5.

(7) The general demurrers of H. A. Adams, filed October 30, 1939, omitting paragraphs 3 to 15, inclusive.

(8) The general demurrers of A. A. A. Highway Express, Inc., filed Nov. 6, 1939, omitting paragraphs 5 and 6.

(9) The general demurrers of East & West Motor Lines, Inc., filed November 6, 1939, omitting paragraphs 5 and 6.

(10) The general demurrer of H. L. Bass, filed November 6, 1939.

(11) The general demurrers of Roy R. Reagin, Georgia Motor Express, Inc., S. S. Sale, and Southeastern Stages, Inc., filed November 4, 1939.

[fol. 4] (12) The general demurrers of Eveready Cab Co., filed Nov. 6, 1939, omitting paragraphs 3 through 15 inclusive.

(13) The general demurrer of J. A. Booker, filed November 6, 1939.

(14) The general demurrer of Fletcher T. Kaylor, filed November 8, 1939.

(15) The general demurrers of J. F. Murray, filed November 9, 1939, omitting paragraphs 2 to 11, inclusive.

(16) The general demurrers of Kaler Produce Co.; Cox Bros. Undertakers; Atlanta-Macon Motor Express, and Southeastern Motor Lines, filed November 29, 1939, omitting paragraph 11.

(17) The general demurrers of J. Russell, filed November 28, 1939.

(18) The general demurrers of Continental Carriers, filed November 30, 1939, omitting paragraph 11.

(19) The general demurrer of Weathers Bros. Transfer Co., Inc., filed November 30, 1939.

(20) Demurrers of Bateman Company, Inc., Downie Brothers Circus, Kinnett-Odom Company, Inc., and South-

ern Stages, Inc., filed December 14, 1939, omitting paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

(21) Additional demurrer of H. L. Bass, filed December 27, 1939, omitting paragraph 4.

(22) Additional demurrer of J. Russell, filed August 14, 1940.

(23) Additional demurrer of Kaler Produce Company, Cox Brothers Undertakers, Atlanta-Macon Motor Express, Inc., Southeastern Motor Lines, Inc., Continental Carriers, filed August 13, 1940.

[fol. 5] (24) Additional demurrer of Bateman Company, Inc., Downie Brothers Circus, Kinnett-Odom Company, Inc. and Southern Stages, Inc., filed August 10, 1940.

(25) The order of the Court sustaining the demurrers of the defendants and dismissing plaintiff's petition, dated August 22, 1940, and amended August 23, 1940.

Plaintiff shows that the Supreme Court has jurisdiction of this cause for the reason that it is an equitable action, and for the further reason that it involves the construction of the Constitution of the United States.

Plaintiff-in-error respectfully presents this bill of exceptions.

Powell, Goldstein, Frazer & Murphy. Elliott Goldstein, Attorneys for Plaintiff-in-Error, 1130 C. & S. Bank Building, Atlanta, Georgia.

[fol. 6]

#### ORDER

I hereby certify that the foregoing bill of exceptions is true and specifies all of the record material to a clear understanding of the errors complained of. The Clerk of the Superior Court of Fulton County is ordered to make up a complete copy of the portions of the record specified in the bill of exceptions and certify the same as such, and transmit the same to the next term of the Supreme Court of Georgia, that the errors complained of may be considered and corrected.

This 17 day of September, 1940.

(Signed) Paul S. Etheridge, Judge S. C. A. C.

Minutes 197 page 461.

[fol. 7] Service of the within bill of exceptions acknowledged; copy received. This — day of September, 1940.

Reynolds & Brandon by R. J. Reynolds, Jr., Attorneys for A. A. A. Highway Express, Inc.; East & West Motor Lines, Inc., Defendants in Error.

Sept. 18.

Howell & Post, Attorneys for Roy R. Reagin, Georgia Motor Express, Inc., S. S. Sale, d/b/a Sale Transfer Company, and Southeastern Stages, Inc., Defendants in Error. R. Earl Camp, Attorney for Service Coach Line, Inc., Defendant in Error.

Sept. 17.

Joseph E. Webb & P. J. Smith by Frank Hooper, Jr., Attorneys for H. A. Adams, trading as Adams Transfer Co., Defendant in Error. Carlisle Cobb, Thos. R. R. Cobb & G. N. Bynum, Attorneys for H. L. Bass, trading as Bass Bus Line, Defendant in Error.

Sept. 17

Erwin & Nix, Frank & Hooper, Jr., Attorneys for Eveready Cab Company, Defendant in Error. James C. Howard, Jr.

Sept. 17.

Bright, Brannen & Howard, Attorneys for J. H. Booker, d/b/a Savannah Beach Line and/or Atlantic Stages, Defendant in Error. Boykin & Boykin, E. S., Attorneys for Fletcher T. Kaylor, d/b/a [fol. 8] Kaylor Transfer Co., Defendant in Error.

Sept. 18.

Bryan, Richardson and Mobley, Attorneys for J. T. Murray, d/b/a Georgia Alabama Coach Line, Defendant in Error.

Sept. 19.

Hooper, Hooper & Miller, Attorneys for Kaler Produce Company, Cox Brothers Undertakers, Atlanta-

Macon Motor Express, Inc.; Southeastern Motor Lines, Inc. and or Cedartown Bus Line; Continental Carriers, Inc., Defendants in Error. J. L. Flemister, Attorney for Weathers Bros. Transfer Co., Inc., Defendant in Error.

Sept. 17.

Earl Norman, Attorney for J. Russell, d/b/a Russell Transfer Co., Defendant in Error.

Sept. 17.

Frank Hooper, Jr., for Martin, Martin & Snow, and Jones, Jones & Sparks, Attorneys for Bateman Company, Inc.; Downie Brothers Circus; Kinnett Odom Company, Inc.; Southern Stages, Inc., Defendants in Error.

Sept. 17.

Hirsch, Smith & Kilpatrick, A. S. Clay, J. E. Gortatowsky, Attorneys for M. & A. Motor Freight Lines Incorporated.

Sept. 17.

[fol. 9] [File endorsement omitted.]

Clerk's Certificate to foregoing paper omitted in printing.

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[fols. 10-11] IN SUPREME COURT OF GEORGIA

No. 13549

LOUIS H. PINK, Superintendent of Insurance of the State of New York, Plaintiff in Error,

vs.

A. A. A. HIGHWAY EXPRESS, INC. et al., Defendants in Error

AMENDMENT TO BILL OF EXCEPTIONS—Filed October 30, 1940

To the Honorable The Supreme Court of Georgia:

Now comes Louis H. Pink, superintendent of insurance of the State of New York, plaintiff in error, and amends his bill of exceptions as follows:

By adding to the list of defendants in error, and naming as a defendant in error, M. & A. Motor Freight Lines, Inc.

Plaintiff in error shows that the foregoing defendant in error was omitted from the bill of exceptions by inadvertence, but that service was acknowledged for the aforesaid M. & A. Motor Freight Lines, Inc. by its attorneys of record.

Respectfully submitted, Powell, Goldstein, Frazer & Murphy, Elliott Goldstein, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

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[fol. 12] IN SUPERIOR COURT OF FULTON COUNTY

PETITION—Filed October 13, 1939

To the Superior Court of Said County:

The petition of Louis H. Pink, Superintendent of Insurance of the State of New York, would show:

1. That one or more of the named defendants are residents of Fulton County, and that all of the defendants are residents of the State of Georgia.

2. The Auto Cab Mutual Indemnity Company was incorporated under Article 10-B of the Insurance Law of the State of New York on May 26, 1932 as a mutual automobile casualty insurance company. With the approval of the Insurance Department of the State of New York, its name was changed on February 21, 1933, to Auto Mutual Indemnity Company (hereinafter called the Company).

3. On the application of the Superintendent of Insurance of the State of New York, an order was made by the Supreme Court of the State of New York placing the Company in rehabilitation pursuant to Article XI of the Insurance Law of the State of New York. Said order was made, entered and filed in the office of the Clerk of New York County on November 12, 1937.

4. The Company being insolvent, it was placed in liquidation on that ground by an order of the Supreme Court of the State of New York made, entered and filed in the



[fol. 13] office of the Clerk of New York County on November 24, 1937. Said liquidation proceedings are entitled "In the matter of Liquidation of the Auto Mutual Indemnity Company," and are still pending.

5. Pursuant to Section 422 of the Insurance Law of the State of New York, on February 4, 1938, which was within one year from the date of the entry of the orders of rehabilitation and liquidation, the Superintendent of Insurance filed in said proceedings a report setting forth the reasonable value of the assets of the Company, its probable liabilities, and the probable necessary assessment to pay all allowed claims in full.

6. Upon the basis of said report, pursuant to Section 422 of the Insurance Law of the State of New York, an order was made on February 7, 1938 at Special Term, Part II of the Supreme Court of the State of New York, held in the County of New York, Honorable Bernard L. Sheintag, presiding, directing that an assessment of forty (40%) per cent of premiums earned during the preceding year be levied against all members of the Company, against whom an assessment might have been levied on November 10, 1937 (the date of the commencement of the proceedings against the Company). Said order was duly filed in the office of the Clerk of New York County on February 8, 1938.

7. The Superintendent thereupon computed the amount of assessment due from each policy, and, pursuant to Section 432 of the Insurance Law of the State of New York, computed the amount of indebtedness of each member to [fol. 14] the Company apart from the indebtedness for assessment. These computations were incorporated as Exhibit "E" in a second and supplemental report with regard to the assessment accompanied by a return which, among other things, referred to and made a part thereof the report previously filed, upon which the order of February 7, 1938, was made.

8. On the basis of the supplemental report an order was made August 12, 1938, at Special Term, Part II of the Supreme Court of the State of New York, which, together with the petition, report and exhibits of the Superintendent of Insurance, was duly filed in the office of the Clerk of New York County. Said order directed each member during the year prior to November 10, 1937, to pay the amount as-

essed against him to the Superintendent of Insurance on or before September 19, 1938, and to pay such other amounts for which they were indebted as appeared from said Exhibit "E".

9. Said order further directed that, failing to make such payments, the members were to show cause on September 29, 1938, at Special Term, Part I of the Supreme Court of the State of New York why they should not be held liable to pay such assessments, together with costs as provided by Section 422 of the Insurance Law of the State of New York, and further directed that they show cause why they should not be held liable to pay any other indebtedness which they might owe the Superintendent of Insurance, and why the Superintendent should not have judgment therefor.

10. Pursuant to Section 422 of the Insurance Law of the [fol. 15] State of New York, notice of this order was mailed to all of the members of the Company, including each of the defendants herein.

11. None of the defendants appeared to show cause why they should not be held liable to pay the aforesaid sums, nor have they made payment as directed by the said order.

12. All of the defendants were policyholders and members of the Company during the year prior to November 10, 1937.

13. At the time each of the defendants purchased his policy and became a member of the Auto Mutual Indemnity Company there was in force a statute of the State of New York, which, under the statutes and Court decisions of New York, became a part of his contract and binding upon him, to-wit, Section 346 of the Insurance Law of the State of New York which provides:

Section 346. The Corporation shall in its by-laws and policies fix the contingent mutual liability of the members for the payment of losses and expenses not provided for by its admitted assets; but such contingent liability of a member shall not be less than an amount equal to twice the amount of, and in addition to, the cash premium provided for in the policy, except that a corporation which has amended its charter to provide for the transaction of additional kinds of insurance may amend its by-laws to provide that the contingent mutual liability of a member shall not be less than

an amount equal to and in addition to, the cash premium provided for in the policy. \* \* \*

[fol. 16] All assessments, whether levied by the board of directors, by the Superintendent of Insurance in the liquidation of the corporation, or otherwise, shall be for no greater amount than that specified in the policy or by-laws.

14. The names of the defendants herein, their residence, the number of their policies, the period for which they are liable to assessment, the premium earned during that period, the amount of assessment for which they are liable, the other indebtedness due the Superintendent and their total indebtedness are as follows:

## Defendant

Policy Number	Assessment Period From	To	Earned Premium	Amount of Assessment	Other In-debtedness Premiums	Total
A C 28543	11/10/36	12/7/36	\$ 182 51	\$ 73 03	\$	\$
A C 42000	12/7/36	4/2/37	861 11	511 45		417 48
A C 32089	11/10/36	6/30/37	305 09	122 03		122 03
A C 41958	11/10/36	10/30/37	1295 97	518 39		518 39
A C 34561	11/10/36	7/20/37	1049 87	419 94	2 12	
A C 68082	7/20/37	11/10/37	611 73	244 69	596 29	1263 04
A C 54765	4/26/36	11/24/37	14 52	5 81		5 81
A C 20397	11/10/36	5/29/37	48 79	19 51		
A C 20398	11/10/36	5/29/37	498 46	199 39		
A C 20656	11/10/36	12/30/36	3 13	1 26		
A C 27194	11/10/36	3/13/37	7 87	3 15		
A C 34668	11/10/36	9/28/37	188 02	75 22		
A C 41779	12/30/36	11/10/37	20 85	8 34		
A C 54861	5/29/37	11/10/37	460 76	184 30		
A C 68146	9/28/37	11/10/37	35 41	14 16		505 33
A C 54462	4/3/37	7/20/37	3265 69	1306 28		1306 28
A C 32055	11/10/36	3/3/37	509 15	203 66		203 66
A C 32057	11/10/36	6/25/37	14 92	5 97		5 97

Hibb Transportation & Piggage, Co., Inc.  
532 23 St., Macon, Bibb County, Georgia

J. A. Booker, d/b/a Savannah  
Leach & Bus Line and/or Atlantic Stages, 111  
Bull Street, Savannah, Chatham County, Ga.

J. A. Booker  
111 Bull Street, Savannah, Ga.

Defendant	Policy Number	Assessment Period From To	Earned Premium	Amount of Assessment	Other In-debtedness Premiums	Total
Continental Carriers, Inc. 215 Courtland St., N. E., Atlanta, Fulton County, Georgia	AC34541 AC68226 AC34545	11/10/36 7/14/37 11/10/36	319 80 245 91 171 21	127 92 98 36 68 49	71 37	366 14
Cox Bros. Undertaking Co., Inc. 206 Auburn Ave., N. E., Atlanta, Fulton County, Georgia	AC31941 AC54737	11/10/36 5/9/37	157 86 308 01	63 14 123 20	103 54	289 88
Downie Bros. Circus, Macon, Bibb County, Georgia	AC41785 AC54448 Binder No. 1036	11/16/36 4/12/37 11/5/37	20 63 2363 53	8 25 945 41	245 00	
East & West Motor Lines, 20-14th Street, Atlanta, Fulton County, Georgia	AC31968	11/10/36	7 47 320 32	2 99 128 13		1201 65 128 13
Eveready Cab. Co., Clayton St., Athens, Clarke County, Georgia	AC34748	11/10/36	616 50	246 60		246 90
[fol. 19]						
Georgia Motor Express, 10 Krog Street, Atlanta, Georgia	AC41935	11/10/36	2851 70	1146 68	963 85	2104 53
Hitchcock, Wilcott T., d/b/a Hitchcock Motor Express and Fuller Brush Company, 14 Alexander St., N. W. Atlanta, Fulton County, Georgia	AC49322	2/15/37	1004 62	401 85		401 85
Independent Transfer Co., Brunswick, Glynn County, Ga.	AC68079 AC32072	6/30/37 11/10/36	221 90 384 02	88 76 153 60	106 04	348 40
Kaylor, Fletcher T., d/b/a Kaylor Transfer Company, Carrollton, Carroll County, Ga.	AC54764 AC31931	5/1/37 11/10/36	630 39 539 91	252 16 215 96		468 12
Kaylor Produce Company, 129 Central Ave., Atlanta, Fulton County, Georgia	AC28529 AC42025	11/10/36 12/2/36	80 16 1021 58	32 06 408 63	90 61	531 30

Kinnett Odom Company, Inc., 6th Street,  
Macon, Bibb County, Georgia

[fol. 20]

Leonard, N. H.,  
d/b/a Albany Transfer Co.,  
316-7th Street,  
Albany, Dougherty County, Ga.

Maner's Transfer Company,  
Rome, Floyd County, Georgia

Marchman's Drive Your Self, Inc. and/or Dime  
Taxi Co & Yellow Cabs,  
Columbus, Muscogee County, Ga.

Mendes, Joe,  
Bay Street, Brunswick, Glynn County, Ga.

The Joe Mendes Co., Inc.,  
Brunswick, Glynn County, Ga.

Montgomery & Atlanta Motor Freight Lines, Inc.  
and/or H. V. Benton, 436 Whitehall St., S. W.,  
Atlanta, Fulton County, Georgia

[fol. 21]

Montgomery & Atlanta Motor Freight Lines,  
Inc. and/or J. L. Hightower and/or H. V. Benton,  
436 Whitehall St., S. W.,  
Atlanta, Fulton County, Georgia

Morris, S. J.,  
1275 Holderness St., S. W.,  
Atlanta, Fulton County, Georgia

Murray, J. F., d/b/a Georgia  
Alabama Coach Line  
Arlington, Calhoun County, Ga.

286.76

21.98  
114.00

254.69

2491.34

331.78

12.60

155.60

218.98

286.76

103.64  
15.07

2491.34

157.33  
174.45

12.60

87.44  
57.98  
10.18

218.98

638.68

188.83

34.34  
70.00

638.68

32.83  
156.00

163.56  
21.47

Defendant	Policy Number	Assessment Period From To	Earned Premium	Amount of Assessment	Other Indebtedness Premiums	Total
E. H. Pace Bus Line, Jackson, Butts County, Georgia	AC42052	12/14 36 11/24 37	310 83	124 33	30 69	155 02
Roy R. Reagin, 337 Whitehall St., Atlanta, Fulton County, Georgia	AC29481 AC54092	11/10 36 3/ 7 37 3/ 7 37 4/10 37	608 95 159 37	243 58 63 75		307 33
J. B. Reed, Proprietor, Safety Cab Company, 520 Second Ave., Macon, Bibb County, Georgia	AC34664	11/10 36 3/ 6 37	1053 69	421 48		421 48
[fol. 22]						
J. Russell and/or Russell Transfer Company Washington, Wilkes County, Ga.	AC34743	11/10 36 4/16 37	1190 02	476 01		476 01
S. S. Sale, d/b/a Sale Transfer Company, 1002 Fenwick St. Augusta, Richmond County, Ga.	AC41633	11/10 36 10/ 4 37	916 01	366 40		366 40
Service Coach Lines, Inc., Dublin, Laurens County, Georgia	AC28544 AC28549 AC42042	11/10 36 12/ 9 36 11/10 36 12/ 9 36 12/ 9 36 11/10 37	82 63 31 03 1225 07	33 06 12 41 490 02	13 81	549 30
Southeastern Motor Lines, Inc., and/or Cedartown Bus Line, Carrollton, Carroll County, Ga.	AC34439 AC68241	11/10 36 8/ 8 37 8/ 8 37 11/ 8 37	1473 80 502 84	589 52 201 14	12 06	803 62
Southeastern Stages, Inc., Augusta, Richmond County, Ga.	AC32085	11/10 36 4/15 37	3988 41	1595 36		1595 36
Southern Stages, Inc., Macon, Bibb County, Georgia	AC32097	11/10 36 6 21 37	2844 04	1137 62		1137 62
Weather Bros. Transfer Co., Inc. and/or A.A.A. Van System, Augusta, Richmond County, Ga.	AC42054	11/10 36 10/ 1 37	956 08	382 43	137 76	520 19

[fol. 23] 15. As will appear from the detailed and itemized statement contained in the preceding paragraph, the defendants residing in Fulton County and the amount for which judgment is claimed against them are as follows:

A. A. A. Highway Express, Inc. 532 - 14th St., N. W. Atlanta, Georgia.	\$417.48
Continental Carriers, Inc. 215 Courtland Street, N. E. Atlanta, Georgia.	366.14
Cox Bros. Undertaking Co. Inc. 206 Auburn Avenue, N. E. Atlanta, Georgia.	289.88
East & West Motor Lines, 20 - 14th Street, Atlanta, Georgia.	128.13
Hitchcock, Wilcott T. d b a Hitchcock Motor Express and Fuller Brush Company 14 Alexander St., N. W. Atlanta, Georgia.	401.85
Kaylor Produce Company 129 Central Avenue Atlanta, Georgia.	531.30
Montgomery & Atlanta Motor Freight Lines, Inc. 13 Delta Place, Atlanta, Georgia.	857.66
[fol. 24] S. J. Morris, 1275 Holderness St., S. W. Atlanta, Georgia.	188.83
Roy R. Reagin 337 Whitehall St. Atlanta, Georgia.	307.33
Georgia Motor Express, Inc. 10 Krog St. Atlanta, Georgia.	2104.53

16. The defendants residing outside Fulton County and the amounts for which judgment is claimed against them are as follows:

#### Bibb County

Bateman Co. Inc. 336 Poplar St. Macon, Georgia.	\$505.33
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## Bibb Transportation &amp; Baggage Co. Inc.

552 Second St.

Macon, Georgia.

1306.28

## Wm. M. Moore &amp; Co., a partnership

d/b/a Downie Bros. Circus,

Macon, Georgia.

1201.65

## Kinnett Odom Company, Inc.

6th Street,

Macon, Georgia.

286.76

[fol. 25] J. B. Reed, Proprietor

Safety Cab Company,

520 Second St.

Macon, Georgia.

421.48

Southern Stages, Inc.

Macon, Georgia.

1137.62

## Clarke County

## Adams Transfer Company, a Corporation

Athens, Georgia.

\$122.03

Bass Bus Line

(H. L. Bass)

184 E. Clayton St.

Athens, Georgia.

1268.85

## Eveready Cab Company, a Corporation

Clayton Street,

Athens, Georgia.

246.60

## Butts County

## Atlanta-Macon Motor Express, Inc.

Jackson, Georgia.

518.39

## E. H. Pace Bus Line, a Corporation

Jackson, Georgia.

155.02

## Chatham County

## J. A. Booker d/b/a

Savannah Beach &amp; Bus Line and/or

Atlantic Stages,

111 Bull Street

Savannah, Georgia.

\$209.63

[fol. 26]

## Calhoun County

## J. F. Murray

d/b/a Georgia Alabama Coach Line,

Arlington, Georgia.

\$289.37

## Carroll County

Fletcher T. Kaylor d/b/a Kaylor Transfer Company Carrollton, Georgia.	\$468.12
Southeastern Motor Lines, Inc. &/or Cedartown Bus Line Carrollton, Georgia.	803.62

## Dougherty County

N. H. Leonard d b a Albany Transfer Company 316 Seventh Street, Albany, Georgia.	\$254.69
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## Floyd County

Maner's Transfer Company, a Corporation, Rome, Georgia.	\$2491.34
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## Glynn County

Independent Transfer Company, a Corporation, Brunswick, Georgia.	\$348.40
[fol. 27] The Joe Mendes Company, Inc. Brunswick, Georgia.	168.20

## Laurens County

Service Coach Lines, Inc. Dublin, Georgia.	\$549.30
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## Muscogee County

Marchman's Drive Your Self, Inc. and/or Dime Taxi Co. & Yellow Cabs Columbus, Georgia.	\$331.78
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## Richmond County

S. S. Sale, d/b/a Sale Transfer Company 1002 Fenwick Street, Augusta, Georgia.	\$366.40
Weathers Bros. Transfer Co. Inc.,	

And/or A. A. A. Van System	
Augusta, Georgia. ....	520.19
Southeastern Stages, Inc.	
Augusta, Georgia. ....	1595.36

### Wilkes County

J. Russell	
d/b/a Russell Transfer Company,	
Washington, Georgia. ....	\$476.01

[fol. 28] Wherefore, petitioner prays:

(a) That this petition be filed and that process do issue requiring each and every defendant to be and appear at the next term of this Court to answer petitioner's complaint.

(b) That second originals do issue directed to all and singular the Sheriffs of this State and particularly the Sheriffs of the Counties in which the particular defendants reside, said second originals to be issued for each and every defendant residing outside the County of Fulton and to be transmitted to the Sheriffs of the respective counties for service upon said respective defendants.

(c) That petitioner have judgment for principal, interest and costs.

Powell, Goldstein, Frazer & Murphy. Elliott Goldstein, Attorneys for Louis H. Pink, Superintendent of Insurance of the State of New York, 1120 C. & S. Bank Building, Atlanta, Georgia.

[File endorsement omitted.]

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[fol. 29] IN SUPERIOR COURT OF FULTON COUNTY

No. 127,387

LOUIS H. PINK, Superintendent of Insurance of the State of New York, Plaintiff,

vs.

A. A. A. HIGHWAY EXPRESS, INC. et al., Defendants

AMENDMENT TO PLAINTIFF'S PETITION—Filed June 21, 1940

Now comes the plaintiff, and by leave of the court first had, amends the petition heretofore filed by him in the following particulars, to-wit:

## 1

By adding to said petition a new paragraph to be numbered "15" as follows:

15. Except as to the amount claimed against each of the defendants, the claims asserted herein are identical in character, viz., the liability to assessment pro rata in order to create a fund so that claims of creditors against this insolvent company may be paid.

This action, therefore, presents a common right to be established by the plaintiff against the several defendants named in said petition, and it is proper that a court of equity determine the whole matter in one action. By so doing a multiplicity of actions will be avoided, speedy and effectual relief will be granted and the fund raised by the assessments for the payment of the debts due creditors will not be diminished by unnecessary costs or delayed by separate adjudications of the common questions pending between the parties.

Wherefore, plaintiff prays that this his amendment be allowed and that this court, as a court of equity, take jurisdiction of the cause, determine the common question of law and fact herein involved and the several liability of each of the defendants, and that it do render its decree or decrees [fol. 30] accordingly.

Powell, Goldstein, Frazer & Murphy. Elliott Goldstein, Attorneys for Plaintiff.

*Duly sworn to by M. F. Goldstein, jurat omitted in printing.*

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ORDER

The foregoing amendment allowed and ordered filed subject to demurrer.

This 21st day of June, 1940.

Paul S. Etheridge, Judge S. C. A. C.

[File endorsement omitted.]

[fol. 31] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDMENT TO PLAINTIFF'S PETITION—Filed July 25, 1940

Now comes the plaintiff, Louis H. Pink, superintendent of insurance of the State of New York, and with leave of court first had, amends his petition heretofore filed in the following respects:

1

By adding to paragraph 2 of said petition the following:

"All provisions of charter and amendment relevant to the issues in this case are attached hereto as Exhibit "A," with leave of reference prayed."

2

By adding to paragraph 3 of said petition *as* following:

"All sections of the aforesaid article XI relevant to the issues in this case are attached hereto as exhibit "B," and made a part hereof by reference. All of the aforesaid order relevant to the issues in this case is attached hereto as Exhibit "C," and made a part hereof by reference."

3

By adding to paragraph 4 of said petition the following:

"All of the aforesaid order relevant to the issues in this case is attached hereto as exhibit "D," and made a part hereof by reference."

4

By adding to paragraph 5 of said petition the following:

[fol. 32] "The aforesaid report being quite voluminous, it is not set out as an exhibit to this petition, but will be introduced into evidence at the trial of this cause."

5

By adding to paragraph 6 of said petition the following:

"Said order is attached hereto as exhibit "E," and made a part hereof by reference."

## 6

By adding to paragraph 7 of said petition the following:

"The references in the aforesaid exhibit "E" to each of the defendants herein have been incorporated in this petition as paragraph 14 hereof."

## 7

By adding to paragraph 9 of said petition the following:

"Said order is attached hereto as exhibit "E," and made a part hereof by reference."

## 8

By adding to paragraph 11 of said petition the following:

"The court therefore entered an order on November 17, 1938, confirming the liability of the defendants to pay the assessment, and to pay other indebtedness, pursuant to section 423 of the insurance law of the State of New York, and granting judgment in accordance with section 422 and section 423 of the insurance law, as more fully set out in the order. All of said order relevant to the issues in this cause are attached hereto as exhibit "G," and made a part hereof by reference."

## 9

By striking paragraph 12 of said petition, and inserting in lieu thereof the following:

[foi. 33] "All of the defendants were policyholders of the company during some portion of the year prior to November 10, 1937, as shown by paragraph 14. A copy of the policy issued to each of the defendants containing all of the material portions thereof is attached hereto as exhibit "H," and made a part hereof by reference."

a. The policies of each of the defendants provided on the back thereof the following:

**"Notice to Policyholders**

1. The insured is hereby notified that by virtue of this policy he is a member of the Auto Mutual Indemnity Company and is entitled to vote either in person or by proxy at any and all meetings of said company.

3. The contingent liability of the named insured under this policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limits provided by the insurance law of the State of New York.

b. The by-laws of the company provided that:

## Article I

### Powers

Section 1. The corporate powers of the Auto Mutual Indemnity Company shall be the insurance of persons (including trustees, partnerships, and associations), corporations and joint stock companies on the mutual plan against any or all of the liability specified in article III of the certificate of incorporation.

## Article II

### Members

Section 1. The members of the corporation shall be the policyholders herein. When any member ceases to be a policy holder, he shall cease at the same time to be a member of the corporation.

Sec. 2. A corporation, partnership, association or joint [fol. 34] stock company may become a member of this corporation and may authorize any person to represent it therein and such representative shall have all the rights of an individual member.

c. The charter of the company provided in article IV thereof that the members of the corporation shall be the policyholders therein, as appears from exhibit "A" to this petition.

d. It is the law of New York that every person who accepts a policy of insurance in a mutual insurance company thereby becomes a member thereof."

By adding to paragraph 13 of said petition the following:

"a. Pursuant to the provisions of the aforesaid section, the board of directors provided in the by-laws of the company that: "The Board of Directors shall make an assess-

ment upon the members of the corporation when the cash funds of the corporation are less than the required reserves for unearned premiums, losses and expenses. The contingent mutual liability of the members for the payment of losses and expenses not provided for by the corporation, shall not be less than an amount equal to twice the amount of, in addition to, the cash premiums written in the policy. If the corporation is not possessed of cash funds above its unearned premium sufficient for the payment incurred losses and expenses, as estimated or determined, it shall make an assessment for the amount needed to pay such losses and expenses upon the members liable to assessment therefor, in proportion to their several liability. Every member shall be liable to pay and shall pay his proportionate part of any assessment which may be laid by the corporation in accordance with the law and his contract, covering any deficiency (excess of liabilities over admitted assets) if he is notified [fol. 35] of such assessment within one year after the expiration or cancellation of his policy. Each member's share of the deficiency for which an assessment is made shall be determined by applying to the premium earned on the member's policy during the period to be covered by the assessment the ratio of the total deficiency to the total premiums earned during such periods upon all policies subject to assessment."

"b. It is the law of New York that the aforesaid section 346 compels the company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed in accordance with section 346 of the New York insurance law.

"c. It is the law of New York that every person who was a member of a mutual insurance company at any time within the twelve months prior to the date of the commencement of the rehabilitation or liquidation proceedings against the company is liable to assessment in accordance with section 346 of the New York insurance law.

"d. It is the law of New York that the laws of that State govern the rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that State."



Wherefore, plaintiff prays that this his amendment be allowed and ordered filed.

Elliott Goldstein. Powell, Goldstein, Frazer & Murphy, Attorneys for Plaintiff.

[fol. 36]

#### EXHIBIT "A"

### Certificate of Incorporation of Auto Cab Mutual Indemnity Company

We, the undersigned, all being natural persons of full age, and at least two-thirds of us being citizens of the United States, and at least a majority of us being citizens and residents of this state, do hereby certify and declare that it is our intention to form, and we do hereby associate together to form, a mutual insurance corporation, pursuant to Article 10B of the Insurance Law of the State of New York, being Chapter 28 of the Consolidated Laws, and the acts amendatory thereof and supplementary thereto, in particular Chapter 13 of the Laws of 1916, for the purpose of making the kinds of insurance specified in Article 10B; and that the following is a copy of the charter proposed to be adopted by us as the charter of said Corporation:

#### Charter of Auto Cab Mutual Indemnity Company

##### Article I

The name of this corporation is Auto Cab Mutual Indemnity Company.

##### Article II

The place where this corporation shall be located, and where it shall have its principal business offices, is in the City of New York, County of New York, and State of New York, and it shall have power to conduct its business wherever authorized by law.

[fol. 37]

##### Article III

The kinds of business to be undertaken by this Corporation and the insurance it shall have authority to make are as follows:

Insurance upon or appertaining to automobile, whether stationary or being operated under their own power, and wheresoever they may be, as follows:

(a) Against loss or damage resulting from accident to, or injury suffered by, any person, and for which the person insured is liable; (b) against loss by burglary or theft or both of such hazards; (c) Against loss or damage to automobiles (except loss or damage by fire or while being transported in any conveyance by land or water), including loss by legal liability for damage to property resulting from the maintenance and use of automobiles.

#### Article IV

The members of this corporation shall be the policy holders therein, and when any member ceases to be a policy holder, he shall cease at the same time to be a member of the corporation.

#### Article V

The mode and manner in which the corporate powers of this corporation shall be exercised are through a Board of Directors and through such officers and agents as such Board shall empower.

• • • • •

State of New York

Insurance Department, Albany

George S. Van Schaick, Superintendent of Insurance.

February 21, 1933.

• • • • •

[fol. 38] I Do Hereby Further Certify that said corporation has filed a certificate under the provisions of Section 40 of the General Corporation Law to effect a change of name from its present title "Auto Cab Mutual Indemnity Company," to that of "Auto Mutual Indemnity Company," and approval is hereby given to such proposed change of corporate title under Section 40 of the General Corporation Law, and

• • • • •

In Witness Whereof, I have hereunto set my hand and affixed the official seal of this Department at the City of Albany, New York, the day and year first above written.

George S. Van Schaick, Superintendent of Insurance,  
by Thomas J. Cullen, Deputy Superintendent.  
(Seal.)

[fol. 39]

## EXHIBIT "B"

### New York Insurance Law

#### Chapter 28 of the Consolidated Laws

§ 400. Application of Article; Definitions. 1. This article shall apply to all corporations, associations, societies, orders, partnerships, and individuals to which any article of this chapter is applicable, or which are subject to examination or supervision under any section of this chapter, or which are doing or attempting to do or representing that they are doing the business of insurance in this state, or which are in process of organization for the purpose of or intending to do such business therein, anything as to any such corporations, associations, societies, orders, partnerships, or individuals provided in this chapter or elsewhere in the laws of the state to the contrary notwithstanding.

2. (a) The word "insurer" as used in this article includes all of the above named corporations, associations, societies, orders, partnerships and individuals. (b) The word "superintendent" as used in this article refers to the superintendent of insurance. (c) The word "assets" as used in this article includes all deposits and funds of a special or trust nature.

§ 401. Grounds for Rehabilitation of Domestic Insurer. The superintendent may apply under this article for an order directing him to rehabilitate a domestic insurer upon any one or more of the following grounds; that such insurer (a) is insolvent; \* \* \* (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; \* \* \* (1) has consented through a majority of its directors, stockholders, or members; \* \* \*

§ 402. Order of Rehabilitation; Termination. At any time the superintendent shall deem that further efforts to rehabilitate such insurer would be futile, he may apply to the court under this article for an order of liquidation.

§ 403. Grounds for Liquidation of Domestic Insurer. The superintendent may apply under this article, for an order, directing him to liquidate the business of a domestic insurer upon any one or more of the grounds specified in section four hundred and one of this chapter, regardless of whether or not there has been a prior order directing him to rehabilitate such insurer.

§ 404. Order of Liquidation; Rights and Liabilities. 1. An order to liquidate the business of a domestic insurer shall direct the superintendent and/or his successors in office forthwith to take possession of the property of such insurer and to liquidate the business of the same and to deal with the property and business of such insurer in their own names as superintendents or in the name of the insurer as the court or justice before whom such order is returnable [fol. 40] may direct, and to give notice to all creditors who may have claims against such insurers to present the same.

2. The superintendent and/or his successors shall be vested by operation of law with the title to all of the property, contracts and rights of action of such insurer as of the date of the order so directing them to liquidate. The filing or recording of such order in any record office of the state shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such insurer would have imparted. The rights and liabilities of any such insurer and of its creditors, policyholders, stockholders, members and/or all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such insurer in the office of the clerk of the county where such insurer had its principal office for the transaction of business upon the date of the institution of proceedings under this article. Provided, however, that the right of claimants holding contingent claims on said date to share in an insolvent estate shall be determined by section four hundred and twenty-five of this chapter.

§ 408. Commencement of a Proceeding. The superintendent, the attorney-general representing him, shall, com-

mence any proceeding under this article by an application to the supreme court, or to any justice thereof, in the judicial district in which the principal office of the insurer involved is located, for an order directing such insurer to show cause why the superintendent should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, which shall be held by the court or justice without delay, such court, or justice shall either deny the application or grant the same together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, and/or the public may require.

§ 420. Set-offs. 1. In all cases of mutual debts or mutual credits between the insurer and another person, such credits and debts shall be set off and the balance only shall be allowed or paid.

2. No set-off shall be allowed in favor of any such person, however, where (a) the obligation of the insurer to such person would not then entitle him to share as a claimant in the assets of such insurer, or (b) the obligation of the insurer to such person was purchased by or transferred to such person with a view of its being used as a set-off, or (c) the obligation of such person is to pay an assessment levied against the members of a mutual insurer or to pay a balance upon a subscription to the capital stock of a stock corporation insurer.

§ 422. Levy of Assessment; Determination of Liability of Members Thereof. 1. Within one year from the date of the entry, on or after the first day of January, nineteen hundred thirty-four, of an order of rehabilitation or liquidation of a domestic mutual insurer in the office of the clerk of the county in which ~~such~~ insurer had its principal office, [fol. 41] the superintendent shall make a report to the court setting forth (a) the reasonable value of the assets of such insurer; (b) its probable liabilities; and (c) the probable necessary assessment, if any, to pay all allowed claims in full.

2. Upon the basis of such report, including any amendments thereof, the court may levy one or more assessments against all members of such insurer against whom the board of directors of such insurer might have levied an assessment upon the date of the issuance of the order to show

cause under section four hundred and eight of this chapter in the special proceeding pending against such insurer. Such assessment or assessments shall cover the excess of the probable liabilities over the reasonable value of the assets, together with the cost of collection and the probable percentage of uncollectibility thereof, but, the total of all such assessments against any member shall not exceed the maximum amount fixed in the contract of that member, provided such contract has been made in conformance to the statute applicable thereto.

3. The court may thereupon issue an order directing each member of such insurer, if he shall not pay the amount assessed against him to the superintendent, on or before a day to be specified in said order, to show cause in the special proceeding pending against such insurer under this article why he should not be held liable to pay such assessment together with costs as set forth in subsection five of this section and why the superintendent should not have judgment therefor.

4. The superintendent shall cause a notice of such order setting forth a brief summary of the contents of such order (a) to be published in such manner as shall be directed by the court; and (b) to be enclosed in a sealed envelope, addressed and mailed, postage prepaid, to each of said members at his last known address as the same appears on the books of the insurer, or at his last known address, if no address appears upon such books, at least twenty days before the return day of such order to show cause.

5. On the return day of such order to show cause, (a) if such member shall not appear and serve verified objections upon the superintendent, the court shall make an order adjudging that such member is liable for the amount of such assessment together with ten dollars costs and that the superintendent may have judgment against such member therefor; (b) if such member shall appear and serve verified objections upon the superintendent there shall be a full hearing before the court or a referee to hear and determine, who, after such hearing, shall make an order either negating the liability of such member to pay the assessment or affirming his liability to pay the whole or some part thereof together with twenty-five dollars costs and the necessary disbursements incurred at said hearing, and directing that

the superintendent in the latter case may have judgment therefor.

6. A judgment upon any such order, whether granted by a court or by a referee, shall have the same force and effect, and may be entered and docketed and may be appealed from as if it were a judgment in an original action brought in the [fol. 42] court in which the special proceeding is pending.

§ 423. Determination of Liability of Members for Other Indebtedness. If it shall appear that a member of a domestic mutual insurer is indebted to such insurer apart from his liability to assessment, the court may, upon the application of the superintendent, in any order under section four hundred and twenty-two of this chapter directing such member to show cause why he should not be held liable to pay an assessment, likewise direct him to show cause why he should not be held liable to pay such indebtedness. And the liability of such member for such other indebtedness shall be determined in the same manner, and at the same time, that his liability for such assessment is determined, and the superintendent may likewise have judgment therefor, but without any additional costs.

[fol. 43]

#### EXHIBIT "C"

At a Special Term of the Supreme Court of the State of New York, Part I thereof, held in and for the County of New York, in the Borough of Manhattan, City, County and State of New York, on the 12th day of ~~September~~ November, 1937.

Present: Hon. Aron Steuer, Justice.

In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by Louis H. Pink, as Superintendent of Insurance of the State of New York, for an Order to Take Possession of the Property and Rehabilitate the Business and Affairs of the Auto Mutual Indemnity Company

Upon reading and filing the order to show cause made on the 10th day of November 1937, by Hon. Isidore Wasservogel, one of the Justices of the Supreme Court of the State



of New York, and the petition of Louis H. Pink, Superintendent of Insurance of the State of New York, duly verified the 10th day of November 1937, together with the duly acknowledged consent of a majority of the Board of Directors of the Auto Mutual Indemnity Company dated the 10th day of November 1937, attached thereto, with due proof of service thereof on the 10th day of November 1937, by James R. Kelly, and it appearing therefrom that the Auto Mutual Indemnity Company is an insurance corporation organized under Article X-b of the Insurance Law of the State of New York; and that its principal office is located in the Borough of Manhattan, City, County and State of New York, and is amenable to the Insurance Law of the State of New York; and that a majority of the directors of the said company have consented to the making and entry of an order of this Court directing the Superintendent of Insurance of the State of New York, to take possession of the property and business of and rehabilitate the said Auto Mutual Indemnity [fol. 44] Company pursuant to and in accordance with Section 401 of the Insurance Law; and the motion made upon such order to show cause having regularly come on to be heard before this Court on the 12th day of November 1937, and the Court having heard Hon. John J. Bennett, Jr., Attorney General of the State of New York, representing the Superintendent of Insurance of the State of New York, in support of said motion, and no one appearing in opposition thereto, and due deliberation having been had thereon, and upon filing the opinion of the Court,

Now, on motion of John J. Bennett, Jr., Attorney General of the State of New York, it is

Ordered that the petition of Louis H. Pink, Superintendent of Insurance of the State of New York, be and the same hereby is in all respects granted,—

Ordered that the Superintendent of Insurance of the State of New York, and/or his successors in office, be and he is and they hereby are authorized, empowered and directed to conduct the business and affairs of the said Auto Mutual Indemnity Company as he or they shall deem wise and expedient under and pursuant to the direction of said Court and until further order of this Court, and that application may be made at the foot hereof for such other and further relief and instructions of the Court, as may, from time to time, be necessary, and it is further



Ordered, that this proceeding shall in the future bear the caption "In the matter of the Rehabilitation of the Auto Mutual Indemnity Company" in place and stead of the caption appearing hereon.

Enter.

A. S., J. S. C.

[fol. 45]

EXHIBIT "D"

At a Special Term of the Supreme Court of the State of New York, Part I Thereof, Held in and for the County of New York, in the Borough of Manhattan, City, County and State of New York, on the 24th Day of November, 1937.

Present: Hon. Aron Steuer, Justice.

In the Matter of The Application of the People of the State of New York, by Louis H. Pink, as Superintendent of Insurance of the State of New York, for an Order to Take Possession of the Property and Liquidate the Business and Affairs of the AUTO MUTUAL INDEMNITY COMPANY

ORDER OF LIQUIDATION .

Upon reading and filing the order to show cause made on the 23rd day of November, 1937, by Hon. Isidor Wasservogel, one of the Justices of the Supreme Court of the State of New York, and the petition of Louis H. Pink, Superintendent of Insurance of the State of New York, duly verified the 23rd day of November, 1937, together with the copy of the order of rehabilitation duly made, entered and filed in the office of the County Clerk of New York County on the 12th day of November, 1937, attached thereto, all with due proof of service thereof on the 23rd day of November, 1937, by James R. Kelly, and it appearing therefrom that the Auto Mutual Indemnity Company is an insurance corporation organized under Article X-b of the Insurance Law of the State of New York, that its principal office is located in the Borough of Manhattan, City, County and State of New York, and that it is amenable to the Insurance Law of the State of New York; and the motion upon such order to show cause having regularly come on to be heard before this Court on the 24th day of November, 1937, and the Court having heard Irvin Waldman, attorney for the Superintendent of Insurance of the State of New York, as Rehabilitator

of the Auto Mutual Indemnity Company, in support of said motion, and no one appearing in opposition thereto, and due [fol. 46] deliberation and it having been had thereon, having been had thereon, and it appearing to my satisfaction that further efforts to rehabilitate the business and affairs of the Auto Mutual Indemnity Company would be futile and that the said company is insolvent and has been found after examination to be in such condition that the further transaction of business would be hazardous to its policyholders, creditors and to the public, and that its continuance in business of insurance is contrary to public policy; and upon filing the opinion of the Court,

Now, on motion of Irvin Waldman, attorney for the Superintendent of Insurance of the State of New York, as Rehabilitator of the Auto Mutual Indemnity Company, it is

Ordered, that the petition of Louis H. Pink, Superintendent of Insurance of the State of New York, be and the same hereby is in all respects granted, and it is further

Ordered, that the said Louis H. Pink, Superintendent of Insurance of the State of New York and/or his successors in office be and they hereby are authorized and directed forthwith to take possession of the property and liquidate the business and affairs of the said Auto Mutual Indemnity Company under and pursuant to the provisions of Article XI of the Insurance Law of the State of New York; and that said Superintendent of Insurance of the State of New York and his successors in office, be and they hereby are vested with title to all of the property, contracts and rights of action of the said company; and they hereby are directed to deal with the property and business of said company in his or their own names as Superintendents of Insurance of the State of New York, and it is further

. . . . .

Ordered, Adjudged and Decreed That the Said Auto Mutual Indemnity Company is insolvent, and it is further

. . . . .

Ordered, that the corporate charter of the Auto Mutual Indemnity Company be and the same hereby is forfeited and annulled and the corporation is hereby dissolved, and it is further

Ordered that the said Superintendent of Insurance and/or his successors in office, may, if they see fit, levy an assessment against policyholders in accordance with and pursuant to the Insurance Law of the State of New York and/or the by-laws of the said Auto Mutual Indemnity Company, and take such steps as he or they may deem necessary to enforce the collection of the same, and it is further

Ordered that all further papers in this proceeding shall bear the caption and be entitled

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[fol. 47] SUPREME COURT OF THE STATE OF NEW YORK COUNTY  
OF NEW YORK

In the Matter of the Liquidation of the AUTO MUTUAL IN-  
DEMNITY COMPANY" in Place and Stead of the Caption  
Heretofore Used

Enter.

A. S., J. S. C.

[fol. 48] EXHIBIT "E"

At a Special Term, Part II of the Supreme Court of the State of New York, Held in and for the County of New York, at the County Courthouse in the Borough of Manhattan, City, County and State of New York, on the 7th Day of February 1938.

Present: Hon. Bernard L. Shientag, Justice.

Index No. 28894-37

In the Matter of the Liquidation of the AUTO MUTUAL  
INDEMNITY COMPANY

ORDER

Upon reading and filing the petition and report on assessment of Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the Auto Mutual Indemnity Company, duly verified the 4th day of February 1938, together with the Exhibits thereto annexed, and it appearing therefrom that it is necessary that an assessment be levied and the liability of the members of the Auto Mutual Indemnity Company for such assessment be determined pursuant to Section 422 of the Insurance Law,

Now, upon motion of Irvin Waldman, Attorney for Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the Auto Mutual Indemnity Company, it is

Ordered that an assessment of forty (40%) per centum be levied against all members of the said Auto Mutual Indemnity Company against whom an assessment might have been levied on November 10th, 1937, the date of the issuance of the order to show cause under Section 408 of the Insurance Law of the State of New York, initiating the rehabilitation proceeding against the said Auto Mutual Indemnity Company.

Enter.

B. L. S., J. S. C.

Filed Feb. 8, 1938. N. Y. Co. Clk's. Office. A Copy Archibald R. Watson, Clerk. No Fee.

[fol. 49]

EXHIBIT "F"

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, in the Borough of Manhattan, City, County and State of New York, on the 12th day of August, 1938.

Present: Hon. Ferdinand Pecora, Justice.

Index No. 28894-1937

In the Matter of the Liquidation of the AUTO MUTUAL  
INDEMNITY COMPANY

ORDER TO SHOW CAUSE

Upon reading and filing the petition of Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the Auto Mutual Indemnity Company, duly verified the 9th day of August, 1938, the report of Milton O. Loysen, Special Deputy Superintendent of Insurance in charge of the liquidation of said company, duly verified the 8th day of August, 1938, together with the exhibits thereto annexed; and it appearing therefrom that it is necessary that an assessment be levied and the liability of members of the Auto Mutual Indemnity Company for such assess-

ment and any further indebtedness be determined pursuant to Sections 422 and 423 of the Insurance Law; and it further appearing that this Court by an order heretofore made February 7, 1938, and entered in the office of the Clerk of the County of New York on February 8, 1938, directed that an assessment of forty (40%) per centum be levied against all members of the Auto Mutual Indemnity Company against whom an assessment might have been levied by the Board of Directors of the Auto Mutual Indemnity Company on November 10, 1937, now,

Upon motion of Irvin Waldman, attorney for Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the Auto Mutual Indemnity Company, it is

[fol. 50] Ordered, that the persons, firms, associations, corporations and all others whose names appear in Exhibit E, annexed to the report and petition of Louis H. Pink, Superintendent of Insurance, as Liquidator herein, herewith filed, pay the amount assessed as shown in such Exhibit E, to the Superintendent on or before the 19th day of September, 1938, and in the event of the failure, neglect or refusal of such members to pay such assessment, they and each of them are hereby

Ordered to show cause at a Special Term, Part I, of this Court to be held in and for the County of New York at the County Courthouse, Pearl and Centre Streets, Borough of Manhattan, City, County and State of New York, on the 29th day of September, 1938, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why such members should not be held liable to pay such assessment and the Superintendent have judgment therefor, together with costs as provided by law, viz, (a) the sum of \$10.00 if on the return day of this order to show cause such members shall not appear and serve verified objections upon the Superintendent as herein provided, and (b) the sum of \$25.00 and the necessary disbursements incurred at a hearing in the event that such members shall appear and serve verified objections upon the Superintendent and after a hearing before the Court or Referee, an order shall be made affirming the liability of the member to pay the whole or some part thereof, and it is further

Ordered, that at the same place and time, viz, the 29th day of September, 1938, unless payment thereof be made prior thereto, the members of the Auto Mutual Indemnity

Company, whose names appear in Exhibit E annexed to the report of the Superintendent and who appear therein to be indebted to the Auto Mutual Indemnity Company, show cause why they should not be held liable to pay such indebtedness and why their respective liabilities should not be determined, and the Superintendent of Insurance, as Liquidator, have judgments therefor and it is further

Ordered that objections to the assessment and such other indebtedness as is set forth in Exhibit E annexed to the [fol. 51] said report of the Superintendent and made a part thereof, shall be in writing, verified under oath, containing the grounds on which the objections are made and the facts relied upon by the objector, and shall be filed with the Clerk of New York County and a copy thereof served upon Irvin Waldman, attorney for the Superintendent of Insurance of the State of New York, at 111 John Street, New York, New York, on or before 12:00 o'clock noon the 27th day of September, 1938, and it is further

Ordered, that Louis H. Pink, Superintendent of Insurance of the State of New York, as Liquidator of the Auto Mutual Indemnity Company shall cause a notice of this order setting forth a brief summary of the contents thereof to be published in the Journal of Commerce and Commercial and New York Law Journal, twice a week for two successive weeks commencing the week of August 15, 1938, and it is further

Ordered, that he shall further cause the same or a similar notice of this order, setting forth a brief summary of the contents thereof, to be enclosed in a sealed envelope, addressed and stamped, postage prepaid, to each of said members at his last known address as the same appears on the books of the insurer, or at his last known address if no address appears upon such books, on or before the 9th day of September, 1938.

Enter.

F. P., J. S. C.

A Copy. Archibald R. Watson, Clerk. No Fee.

[fol. 52]

# EXHIBIT "G"

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, Centre and Pearl Streets, in the

Borough of Manhattan, City, County and State of New York,  
on the 17th day of November, 1938.

Present: Honorable Louis A. Valente, Justice.

In the Matter of the Liquidation of the AUTO MUTUAL  
INDEMNITY COMPANY

ORDER

The Superintendent of Insurance of the State of New York, as Liquidator of Auto Mutual Indemnity Company, having duly made a report of this court pursuant to Section 422 of the Insurance Law of the State of New York, and upon the basis of such report the Court having levied an assessment against the members of the Auto Mutual Indemnity Company against whom the Board of Directors thereof might have levied as assessment on November 10, 1937; and the said Superintendent of Insurance having duly moved this Court for an order confirming the liability of the members to pay such assessment, and in addition thereto any other indebtedness pursuant to Section 423 of the Insurance Law of the State of New York, and for judgment in accordance with Sections 422 and 423 of the Insurance Law of the State of New York,

[fol. 53] And a cross motion having been made by one George E. Truzy for an order vacating and setting aside a certain order made on February 7th, 1938, and entered in the office of the County Clerk of New York County on the 8th day of February, 1938, more particularly hereinafter described,

And a cross motion having been duly made by Dixie Coaches, Inc. for an order vacating and setting aside the order to show cause made herein on the 12th day of August, 1938, and any and all other proceedings had herein insofar as the same relate to and affect Dixie Coaches, Inc. and in the event of a denial of the motion for an order extending the time for the said Dixie Coaches, Inc. to file its objection to any assessment against it herein,

And the said motion of the Superintendent of Insurance as Liquidator and the cross motions hereinbefore described having duly come on to be heard before this Court on the 29th day of September, 1938,

Now, upon reading the petition of Louis H. Pink, Superintendent of Insurance of the State of New York, as Liqui-



dator of the Auto Mutual Indemnity Company, duly verified the 9th day of August, 1938, the report of Milton O. Loysen, Special Deputy Superintendent of Insurance, duly verified the 8th day of August, 1938, together with the exhibits thereto annexed, setting forth the financial statement prepared by the Liquidator as of December 10th, 1937, the list of the members as set forth in Exhibit "E" against whom an assessment was levied, contained in and made a part of said report and designated as the Second and Supplemental Report and petition on Assessment of Policyholders, all filed herein in the office of the County Clerk of New York County on the 12th day of August, 1938, the order herein made on the 7th day of February, 1938 and duly filed in the office of the Clerk of the County of New York on February 8, 1938, directing the levy of an assessment of Forty (40%) per cent against all members of the Auto Mutual Indemnity Company against whom an assessment might have been levied by the Board of Directors of the Auto Mutual Indemnity Company on November 10, 1937, the report herein filed in the office of the County Clerk of New York County upon which the said order of February 7, 1938 was based, the order of liquidation herein duly made, filed and entered in the office of the Clerk of the County of New York on the 24th day of November, 1937, and the Order to Show Cause duly made at Special Term, Part II of this Court, held in and for the County of New York, at the County Courthouse thereof, on the 12th day of August, 1938, herein duly filed in the office of the Clerk of the County of New York, with due proof of the publication of a notice of such order setting forth a brief summary of the contents thereof in the Journal of Commerce and Commercial and the New York Law Journal, twice a week for two successive weeks commencing August 15, 1938, and due proof of the mailing of a similar notice of such order enclosed in a sealed envelope addressed and stamped, postage prepaid, to each of the said members at his last known address as the same appears on the books of the insurer or at his last known address if no address appears on such books, all as required by such order, in support of the motion of the Superintendent of Insurance as Liquidator of the Auto Mutual Indemnity Company for an order confirming the liability of the members of the said company to pay such assessment and for judgment in accordance with Sections 422 and 423 of the Insurance Law of the State of New York,



and the other relief as prayed for, all more particularly hereinbefore set forth,

[fol. 55] And after hearing Irvin Waldman, Esq., attorney for the Superintendent of Insurance of the State of New York, as Liquidator of the Auto Mutual Indemnity Company, in support of such motion, and the following persons having appeared and having served and filed verified objections

\* \* \* \* \*

And due deliberation having been had on all of the said motions, and upon filing the opinion of the Court,

Now, on motion of Irvin Waldman, attorney for the Superintendent of Insurance of the State of New York, as Liquidator of the Auto Mutual Indemnity Company, it is

Ordered that the said motion to approve and confirm the Second and Supplemental Report and Petition of The Superintendent of Insurance as Liquidator, as hereinafter amended, be and the same hereby is in all respects granted, except as hereinafter otherwise provided, and it is further

Ordered that the said Second and Supplemental Report and Petition of the Superintendent of Insurance, as Liquidator, as hereinafter amended, be and the same hereby is in all respects ratified, approved and confirmed, except as hereinafter otherwise provided, and it is further

Ordered that the persons, firms, associations and corporations as set forth in Exhibit "E" of the Liquidator's Second and Supplemental Report, except as hereinafter otherwise provided, are liable for the assessment levied upon them as set forth in the said Second and Supplemental Report of the Superintendent of Insurance as Liquidator, and that the Superintendent of Insurance as Liquidator may have [fol. 56] judgment against each of them, together with \$10.00 costs and disbursements, together with any other indebtedness due from such persons, firms, associations or corporations as set forth in such Exhibit in accordance with Section 423 of the Insurance Law, and it is further

Ordered that the Clerk of the County of New York shall enter judgment in conformity and in accordance with the foregoing direction against all or any of those against whom the Superintendent of Insurance as Liquidator may have judgment as hereinbefore set forth, and that execution shall issue therefor, and it is further

\* \* \* \* \*

Ordered that application may be made at the foot hereof for such other and further relief and instructions of the Court as may, from time to time, be necessary.

Enter,

L. A. V., J. S. C.

Filed Nov. 18, 1938. N. Y. Co. Clk's Office. Archibald R. Watson, Clerk.

No fee. A copy. Archibald R. Watson, Clerk.

[fol. 57]

# EXHIBIT "H"

Established 1922

Auto Mutual Indemnity Company

New York, N. Y.

This Policy is issued in consideration of the payment of a premium and of the Declarations endorsed hereon or attached hereto in the form of endorsements, which are hereby made a part hereof, which Declarations the Insured, by acceptance of this Policy, warrants to be true, and in further consideration of the promise by the Insured to perform each term of this Policy on the Insured's part to be performed both before and after loss or damage.

## Declarations

Item 1. Name of Insured —.

Address Etc. —.

• • • • •

Date and place of Issue —.

Name of Agency —. Countersigned by —, Authorized Agent.

Auto Mutual Indemnity Company

(A Mutual Insurance Company, Herein Called the Company)

Does Hereby Agree with the insured named in the declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the

declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy :

### 1. Coverages

A. Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, \* \* \* Etc.

\* \* \* \* \*

### Conditions

1. \* \* \* Etc.

### [fol. 58] 14. Dividends

The insured shall be entitled to an equitable participation in the funds of the company in excess of the amounts required to pay all policy and other obligations together with the reserve funds required or permitted by law; such distribution shall be made by the company in accordance with the Insurance Law and the charter and by-laws of the Company, based upon the claim experience which shall be computed separately by classes of risks and/or States and territories.

15. \* \* \*

In Witness Whereof, the Auto Mutual Indemnity Company has caused this policy to be signed by its President and Secretary, but the policy shall not be binding upon the Company, until countersigned by a duly authorized agent of the Company.

Vincent Scully, Secretary; Frank Bailey, President.  
(Seal.)

(Auto Mutual Indemnity Company of New York—Established 1922.)

On Back of Policy:

No. —

National Standard Automobile Policy

Expires — 19—

Issued to

Auto Mutual Indemnity Company

Established 1922

Home Office, New York, N. Y.

Issued by

—Branch Office

Auto Mutual Indemnity Co.

[fol. 59]

The Old Reliable Mutual

(The Safeguard Against Accidents—Auto Mutual Indemnity Company.)

### Notice to Policyholders

1. The Insured is hereby notified that by virtue of this Policy he is a member of the Auto Mutual Indemnity Company and is entitled to vote either in person or by proxy at any and all meetings of said company.

2. The annual meetings are held at the Home Office of the Company in New York City on the second Tuesday of January in each year, at twelve o'clock noon.

3. The contingent liability of the named Insured under this Policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limit provided by the Insurance Law of the State of New York.

[fol. 60]

## ORDER

The foregoing amendment being read and considered, the same is hereby allowed and ordered filed subject to demurrers of the defendants.

This 25th day of July, 1940.

Edgar E. Pomeroy, Judge S. C. A. C.

[File endorsement omitted.]

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[fol. 61] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDMENT TO PLAINTIFF'S PETITION—Filed August 19, 1940

Now comes the plaintiff and by leave of the court first had, amends the petition heretofore filed by him by adding to the amendment filed July 25, 1940, the following additional allegations:

## 1

By adding to paragraph 13 of the original petition immediately following the words "provided for in the policy" quoted in said paragraph, an additional quotation from said section 346, to wit:

"Every member shall be liable to pay, and shall pay his proportionate part of any assessment which may be laid by the corporation in accordance with law and his contract on account of losses and expenses incurred while he was a member, if he is notified of such assessment within one year after the expiration of his policy \* \* \*."

## 2

By adding a new paragraph immediately following paragraph 10 of the amendment of July 25, 1940, which paragraph is to be known as paragraph 10 (a) of the petition as amended, as follows:

"10 (a). I

Petitioner will present to the court on the trial of this case the acts of the legislature of the State of New York

referred to in the preceding paragraph, duly authenticated by the great seal of the State of New York, and will present [fol. 62] the records and judicial proceedings above referred to, duly attested under the seal of the court, all as is provided by section 38-627 of the Code of Georgia, and by the United States Revised Statutes, section 905, title 28, section 687.

Petitioner contends that the said public acts, judicial proceedings and records of the State of New York aforesaid, are entitled and should receive full faith and credit in the courts of this State and in this proceeding, as is specifically provided in section 38-627 of the Code of Georgia of 1933 and by article 4, section 1 of the constitution of the United States (Code section 1-401) which provides:

“Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribed the manner in which such acts, records and proceedings shall be proved, and the effects thereof.”

Any judgment or ruling which fails to give said acts and proceedings the full force and credit that they have by law and usage in the courts of New York has the effect of denying to the said acts and proceedings the constitutional protection aforesaid.

## 10 (A) II

Petitioner further alleges that any judgment which denies or has the effect of denying to the judgments and statutes aforesaid the full force and effect to which they are entitled under the constitution and laws aforesaid, abridges the privileges and immunities of this petitioner as a citizen of the United States, contrary to the fourteenth amendment of the United States, Code of Georgia, sec. 1-815, which provides:

“Citizenship. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge [fol. 63] the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

Wherefore, petitioner prays that these his amendments be allowed and ordered filed as part of the original cause of action.

Elliott Goldstein, Powell, Goldstein, Frazer & Murphy, Attorneys for Petitioner.

#### ORDER

The foregoing amendment is hereby allowed and ordered filed, subject to defendants' demurrers.

This 14th day of August, 1940.

Paul S. Etheridge, Judge S. C. A. C.

[File endorsement omitted.]

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[fol. 64] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

AMENDMENT TO PLAINTIFF'S PETITION—Filed August 26, 1940

With leave of the Court comes the plaintiff, and in order to properly identify the copy of the insurance contract with the defendants and make same part of the record in lieu of the excerpts therefrom, files the following amendment:

#### 1

Plaintiff strikes paragraph 9 from the amendment filed and allowed on the 25th day of July, 1940, and substitutes therefor the following paragraph, designating the same as 9(2) for clarity:

#### 9 (a)

By striking paragraph 12 of said petition and inserting in lieu thereof the following:

All of the defendants were policyholders of the company during some portion of the year prior to November 10, 1937, as shown by paragraph 14. A copy of the policy issued to each of the defendants is attached hereto as exhibit "H"

and made a part hereof by reference. Said policy, as exhibited, is a form only. The policy actually held by the defendants is filled out with the name, coverage and date of issuance, but each of said defendants have a policy similar to said exhibit H and the same is the type of policy used generally by the company during the time above referred to, and is the type of policy that was considered by the court in this case, when it entered its order of confirmation referred to in paragraph 8 of said amendment of July 25, 1940.



(Here follow 3 photolithographs, side folios 65, 66, 66½)

# AUTO MUTUAL INDEMNITY COMPANY

(A MUTUAL INSURANCE COMPANY, HEREIN CALLED THE COMPANY)

DOES HEREBY AGREE with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

## I. COVERAGES

A. **Bodily Injury Liability.** To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

B. **Property Damage Liability.** To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

## II. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS

It is further agreed that as respects insurance afforded by this policy the company shall:

(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interests accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and any expense incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The company agrees to pay the expenses incurred under divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy.

## III. DEFINITION OF "INSURED"

The unqualified word "insured" wherever used includes not only the named insured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is "pleasure and business", or "commercial", each as defined herein, and provided further that the actual use is with the permission of the named insured. The provisions of this paragraph do not apply:

(a) to any person or organization with respect to any loss against which he has other valid and collectible insurance;

(b) to any person or organization with respect to bodily injury to or death of any person who is a named insured;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee of an insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such insured.

## IV. AUTOMATIC INSURANCE FOR NEWLY ACQUIRED AUTOMOBILES

If the named insured who is the owner of the automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the company insures all automobiles owned by the named insured at the date of such delivery, insurance applies to such other automobile, if it is used for pleasure purposes or in the business of the named insured as expressed in the declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the company does not insure all automobiles owned by the named insured at the date of such delivery, insurance applies to such other automobile, if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; and (4) this agreement does not apply

(a) to any loss against which the named insured has other valid and collectible insurance, nor

(b) unless the named insured notifies the company within ten days following the date of delivery of such other automobile, nor

(c) except during the policy period, but if the date of delivery of such other automobile is prior to the effective date of this policy the insurance applies as of the effective date of this policy, nor

(d) unless the named insured pays any additional premium required because of the application of this insurance to such other automobile.

## V. POLICY PERIOD, TERRITORY, PURPOSES OF USE

This policy applies only to accidents which occur during the policy period, while the automobile is within the United States in North America (exclusive of Alaska) or the Dominion of Canada, or while on a coastwise vessel between ports within said territory, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

## V. POLICY PERIOD, TERRITORY, PURPOSES OF USE

This policy applies only to accidents which occur during the policy period, while the automobile is within the United States in North America (exclusive of Alaska) or the Dominion of Canada, or while on a coastwise vessel between ports within said territory, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

## EXCLUSIONS

This policy does not apply:

- (a) While the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor;
- (b) While the automobile is used for the towing of any trailer not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile not covered by like insurance in the company;
- (c) While the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person or to his occupation, or by any person in any pre-arranged race or competitive speed test;
- (d) To any liability assumed by the insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named insured in the automobile, without the written consent of the company;
- (e) To bodily injury to or death of any employee of the insured while engaged in the business of the insured, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which the insured may be held liable under any workmen's compensation law;
- (f) To property owned by, rented to, leased to, in charge of, or transported by the insured.

## CONDITIONS

### 1. Automobile Defined—Two or More Automobiles

Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semi-trailer described herein; and the word "trailer" shall include semi-trailer. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

### 2. Limits of Liability

The limit of bodily injury liability expressed in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of one person in any one accident; the limit of such liability expressed in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of two or more persons in any one accident. The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

### 3. Financial Responsibility Laws

Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the Motor Vehicle Financial Responsibility Law of any state or province which shall be applicable with respect to any such liability arising from the use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim or suit, involving a breach of the terms of this policy and for any payment the company would not have been obligated to make under the provisions of this policy except for the agreement contained in this paragraph.

### 4. Notice of Accident—Claim or Suit

Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

### 5. Assistance and cooperation of the Insured

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits and the company shall reimburse the insured for any expense, other than loss of earnings, incurred at the company's request. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

### 6. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the conditions hereof, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured shall not relieve the company of any of its obligations hereunder.

**7. Other Insurance**

If the named insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

**8. Subrogation**

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

**9. Changes**

No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by an executive officer of the company.

**10. Assignment**

No assignment of interest under this policy shall bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within thirty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) subject otherwise to the provisions of paragraph III, any person having proper temporary custody of the automobile, as an insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication.

**11. Premium**

The premium is always considered as paid annually in advance, but, by agreement in Item 4, may be paid in installments. If any premium or installment of premium on this policy be not paid on or before the due or renewal date set forth in Item 4 to the company or its authorized agent, then liability on account of this policy shall wholly cease and terminate as of 12:00 midnight on the date such payment is due.

**12. Cancellation**

This policy may be cancelled by the named insured by mailing written notice to the company stating when thereafter such cancellation shall be effective, in which case the company shall, upon demand, refund the excess of premium paid by such insured above the customary short rate premium for the expired term. This policy may be cancelled by the company by mailing written notice to the named insured at the address shown in this policy stating when not less than five days thereafter such cancellation shall be effective, and upon demand the company shall refund the excess of premiums paid by such insured above the pro rata premium for the expired term. The mailing of notice as aforesaid shall be sufficient proof of notice and the insurance under this policy as aforesaid shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing. The company's check or the check of its representative similarly mailed or delivered shall be a sufficient tender of any refund of premium due to the named insured. If required by statute in the state where this policy is issued, refund of premium due to the named insured shall be tendered with notice of cancellation when the policy is cancelled by the company and refund of premium due to the named insured shall be made upon computation thereof when the policy is cancelled by the named insured.

No notice of cancellation shall be necessary to any person other than the Insured named in Item 1 of the Declarations to terminate the Policy unless specifically provided for by endorsement hereto.

If this Policy be cancelled for any cause whatsoever (regardless whether an agent of the Company and/or the broker through whom this Policy might be written or placed has or has not paid the Company the premium on this policy), it is understood and agreed; that, any claim for return (unearned) premium under this Policy shall be invalid unless or until the premium on this Policy actually shall have been paid either to the Company itself or to its authorized and duly appointed agent.

**13. Endorsements**

(As attached hereto are made part of this policy.)

**14. Dividends**

The insured shall be entitled to an equitable participation in the funds of the company in excess of the amounts required to pay all policy and other obligations together with the reserve funds required or permitted by law; such distribution shall be made by the company in accordance with the Insurance Law and the charter and by-laws of the company, based upon the claim experience which shall be computed separately by classes of risks and/or States and territories.

**15. Declarations**

By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, the AUTO MUTUAL IDEMNITY COMPANY has caused this policy to be signed by its President and Secretary, but the policy shall not be binding upon the Company, until countersigned by a duly authorized agent of the Company.



# SHORT RATE CANCELLATION TABLE

For Term of One Year

	Per Cent of Annual Premium
1 day	2
2 days	4
3	5
4	6
5	7
6	8
7	9
8	10
9	11
10	12
11	13
12	13
13	14
14	14
15	15
16	16
17	16
18	17
19	17
20	19
25	20
30	23
35	26
40	27
45	28
50	29
55	30
60	33
65	36
70	37
75	38
80	39
85	40
90	45
105	50
120	55
135	60
150	65
165	70
180	73
195	75
210	78
225	80
240	83
255	85
270	88
285	90
300	93
315	95
330	100
360	100

REMARKS:

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## NOTICE OF CANCELLATION OF POLICY

Date of Notice from Assured

## AUTO MUTUAL INDEMNITY COMPANY

This policy is herewith returned for cancellation in accordance with the provisions of Condition 12 thereof—such cancellation to become effective at

(Hour)

(Date)

Signature of Assured

## WHAT TO DO AND WHAT NOT TO DO IN CASE OF ACCIDENT

1. Render aid when necessary. Take names and addresses of all witnesses, also badge number of policeman present (if any). Independent witnesses are important.
2. If any other vehicle involved, take name and address of owner and driver and registration number of car—also operator's license (if any).
3. If after lighting-up time, note if all lamps are lighted in accordance with regulations.
4. Carefully note exact nature and condition of damage done.
5. Make a rough sketch plan of position of each car involved in accident, and take notes of exact time of accident, the condition of the road (such as wet or dry).
6. Report the accident immediately to the Company's nearest Claim Department. If in trouble, wire the Company's Home Office for instructions. The more promptly and fully we are advised, the more effectively we can deal with the matter.
7. Don't run away from the scene of accident.
8. Don't assume that the accident is of no importance and that nobody can say you are to blame. "Trivial" accidents sometimes result in troublesome claims. Let the Company have the full details and take over the trouble and responsibility.

### NOTICE TO POLICYHOLDERS

1. The Insured is hereby notified that by virtue of this Policy he is a member of the AUTO MUTUAL INDEMNITY COMPANY and is entitled to vote either in person or by proxy at any and all meetings of said company.
2. The annual meetings are held at the Home Office of the Company in New York City on the second Tuesday of January in each year, at twelve o'clock noon.
3. The contingent liability of the named Insured under this Policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limits provided by the Insurance Law of the State of New York.

### SAFETY CODE REMINDERS

1. Be sure your brakes are in good working order—inspect them frequently.
2. Be alert in your driving and anticipate sudden emergencies.
3. Obey all traffic and parking regulations.
4. Keep to the right and comply with road markings and signs.
5. Signal for stops and turns—watch the car ahead.
6. Slow down at crossings, schools and dangerous places.
7. Never pass cars on hills, curves or crossings.
8. Adapt your driving to road conditions, rain, ice, soft spots in roads.

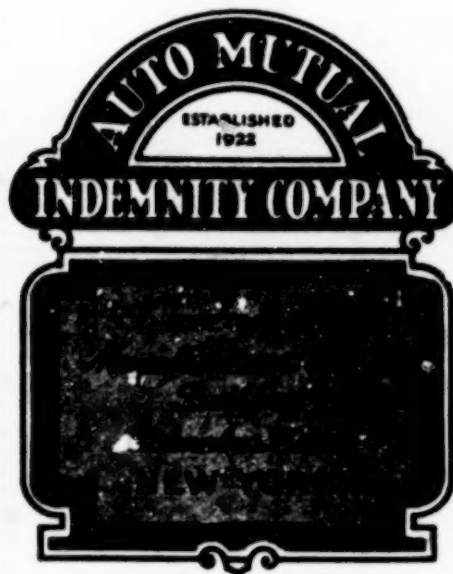
## IMPORTANT - READ YOUR POLICY CAREFULLY

No. AC 58210

### NATIONAL STANDARD AUTOMOBILE POLICY

EXPIRES \_\_\_\_\_ 193 \_\_\_\_\_

ISSUED TO



"THE OLD RELIABLE MUTUAL"



# EXHIBIT "H"



ESTABLISHED 1922

## AUTO MUTUAL INDEMNITY COMPANY NEW YORK, N. Y.

This Policy is issued in consideration of the payment of a premium and of the Declarations endorsed hereon or attached hereto in the form of endorsements, which are hereby made a part hereof, which Declarations the Insured, by acceptance of this Policy, warrants to be true, and in further consideration of the promise by the Insured to perform each term of this Policy on the Insured's part to be performed both before and after loss or damage.

### DECLARATIONS

Item 1 Name of Insured \_\_\_\_\_

Address \_\_\_\_\_  
(Street) (Town) (State)

The automobile will be principally garaged and used in the above town and state, unless otherwise specified herein.

Named Insured is: Individual ☐ Corporation ☐ Partnership ☐

Occupation and Name of Employer \_\_\_\_\_

Item 2 Policy period shall be from \_\_\_\_\_ 193\_\_\_\_\_ to \_\_\_\_\_ 193\_\_\_\_\_,  
12:01 A. M. Standard Time, at the address of the named Insured as stated herein.

Item 3 The insurance afforded is only with respect to such and so many of the following coverages as are indicated by special specific premium charge or charges. The limit of the Company's liability against such coverage shall be as stated herein subject to all of the terms of the policy having reference thereto.

Coverages	Limits of Liability
(a) Bodily Injury Liability	\$_____ each person and subject to that limit for each person, \$_____ each accident
(b) Property Damage Liability	\$_____ each accident

Item 4 The full detailed description of each automobile to be covered by this Policy and the premiums for the insurance effective, are as follows:

TRADE NAME	MODEL YEAR	TYPE OF BODY (also load capacity if truck or trailer, seat- ing capacity if bus)	SERIAL NUMBER	ENGINE NUMBER	PREMIUM	
					BODILY INJURY	PROPERTY DAMAGE

Total Premium \$

payable as follows:

NAME	YEAR	truck or trailer, seating capacity if van	NUMBER	NUMBER	BODILY INJURY	PROPERTY DAMAGE

Total Premium \$ \_\_\_\_\_, payable as follows: \_\_\_\_\_

Where the premium is arranged on an instalment basis it is hereby mutually agreed that if any part premium or instalment of premium provided for in this policy be not paid as hereinabove provided and the policy, therefore, lapses or is cancelled, the Company shall be entitled to an earned premium computed according to the Short Rate Cancellation Table contained in said policy.

Item 5 The purposes for which the automobile is to be used are \_\_\_\_\_

- (a) The term "pleasure and business" is defined as personal, pleasure family and business use.
- (b) The term "commercial" is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto in direct connection with the named Insured's business occupation as expressed in Item 1.
- (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

Item 6 The named Insured is the sole owner of the automobile, except as herein stated \_\_\_\_\_

The assured does not own or operate any other automobiles than those specifically described herein, except as herein stated \_\_\_\_\_

Item 7 No insurer has cancelled any automobile insurance issued to the named Insured during the past year, except as herein stated \_\_\_\_\_

Item 8 The following endorsements are hereby made part of this Policy, AUTO MUTUAL Form Nos.: \_\_\_\_\_

Date and place of issue \_\_\_\_\_

Name of Agency \_\_\_\_\_ Countersigned by \_\_\_\_\_

Authorized Agent.



[fol. 67] Wherefore, plaintiff prays that this his amendment be allowed and ordered filed.

Elliott Goldstein, Powell, Goldstein, Frazer & Murphy, Attorneys for Plaintiff.

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ORDER

The foregoing amendment allowed and ordered filed. This 17 day of August, 1940.

Paul S. Etheridge, Judge S. C. A. C.

[File endorsement omitted.]

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[fol. 68] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed October 24, 1939

And now comes Service Coach Line, Inc., one of the defendants in the above stated case, and before pleading to the merits of said cause files this its demurrer thereunto, and for grounds of demurrer says:

(1)

Because said petition fails to set out any cause of action under the laws of this State.

(2)

Because the specially pleaded insurance law of the State of New York, as embodied in paragraph thirteen of said petition, is a requirement by law of the State of New York different from that imposed by the laws of this State, and of which this defendant had no notice at the time of the issuance to it of its policies designated as: AC 28544; AC 28549; and AC 4242, either in said policies or the laws of this State.

(3) .

Because the insurance contracts designated in plaintiffs' petition were intended to have effect in this State and were executed in Georgia in conformity to the laws of this State

and the statute of the State of New York, specially pleaded has no force and effect in the State of Georgia.

Wherefore, defendant prays that these grounds of its demurrer be inquired into by the court and said petition dismissed.

[fol. 69] R. Earl Camp, P. O. Address, Dublin, Georgia, Attorney for Service Coach Line, Inc.

[File endorsement omitted.]

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[fol. 70] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed October 30, 1939

Now comes H. A. Adams, as individual trading as Adams Transfer Company, the said Adams Transfer Company being one of the defendants named in the above and foregoing case, at the appearance term of said case, and, not waiving his special plea to the jurisdiction heretofore filed, and, before filing his answer therein, files these, his grounds of demurrer thereto, and for cause of demurrer says:

1

Defendant demurs specially to paragraph one (1) of said petition, in that the pleader admits no jurisdiction of this defendant, in that plaintiff alleges that the defendants are residents of other jurisdictions than Fulton, the county in which said suit was filed, and does not allege any matter or thing conferring upon this court jurisdiction over this defendant or the subject matter of said suit, and that said paragraph should be stricken from the petition.

2

Defendant demurs specially to paragraph two (2) of said petition in that all of the things stated therein are conclusions of the pleader; that no copies or certified copies of orders of incorporation or change of name, or change of by-laws, or change of constitution, or of article 10-B of the insurance laws of the State of New York are embodied in or attached to said paragraph and petition, and that this de-

defendant is bound only by the laws of the State of Georgia, in so far as the rights and liabilities of this defendant are concerned, and that this defendant is not bound by any by-laws, constitution, application, or any amendments thereto [fol. 71] not attached to the original policy of insurance, if any, or stated therein, and that said paragraph should be stricken from the petition, in toto.

(3 to 15, both inclusive, omitted.)

16

This defendant also demurs generally to said petition as a whole and for grounds thereof says that said petition fails to set out any cause of action against this defendant and that for said reason said petition should be dismissed.

Joseph E. Webb and P. J. Smith, Attorneys for Defendant, P. O. Address: P. O. Box No. 16, Athens, Georgia.

[File endorsement omitted.]

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[fol. 72] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 6, 1939

Now comes A. A. A. Highway Express, Inc., one of the defendants in the above stated cause, and without waiving its right to file a plea and answer herein, but especially insisting upon the same, and files this its demurrer to plaintiff's petition and for grounds of demurrer says:

I

Defendant demurs to plaintiff's petition on the ground that no cause of action is set out therein against this defendant.

2

This defendant demurs to the allegations contained in paragraph five (5) of plaintiff's petition on the grounds that said allegations fail to set forth what the assets and liabilities of Auto Mutual Indemnity Company consisted of

and the amount of the same and for what purposes and means the assessment upon the policy holders were to be devoted, so as to put this defendant on notice. Defendant further demurs to the allegations contained in paragraph five (5) on the ground that plaintiff's petition fails to allege that this defendant had any knowledge or notice of the things therein alleged.

## 3

This defendant demurs to the allegations contained in paragraphs three (3), six (6), seven (7), and eight (8) of plaintiff's petition on the ground that said paragraphs and said petition fails to allege that this defendant had any notice of the facts alleged in each of said paragraphs, and upon the further ground that the allegations contained in said paragraphs set forth mere conclusions of the pleader [fol. 73] and fail to set forth therein or attach to said petition any copy of the orders and reports referred to in said paragraphs.

## 4

This defendant demurs to the allegations contained in paragraph thirteen (13) of plaintiff's petition on the grounds that the insurance laws of the State of New York that plaintiff specially pleads in said paragraph is a requirement of law of the State of New York different from that imposed by the laws of this State and of which this defendant had no notice at the time of the issuance to it of its policies designated as Policy No. AC 28543, and AC 42060, either in said policies or the laws of this State.

Defendant further demurs to the aforesaid allegations contained in said paragraph thirteen (13) of plaintiff's petition on the ground that the insurance contracts set forth in plaintiff's petition were intended to have effect in the State of Georgia and were executed in the State of Georgia in conformity to the laws of the State of Georgia and the aforesaid specially pleaded statutes of the State of New York have no force and effect in the State of Georgia.

(5 & 6 omitted.)

## 7

This defendant further demurs to plaintiff's petition on the ground that said petition sets forth a misjoinder of parties.

Wherefore, this defendant prays that these its several grounds of demurrer be sustained and that plaintiff's petition be dismissed with all costs upon plaintiff.

Reynolds & Brandon, Attorneys for Defendant, A.  
A. A. Highway Express, Inc.

[File endorsement omitted.]

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[fol. 74] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 6, 1939

Now comes East & West Motor Lines, Inc., one of the defendants in the above stated cause, and without waiving its right to file a plea and answer herein, but especially insisting upon the same, and files this its demurrer to plaintiff's petition and for grounds of demurrer says:

1

Defendant demurs to plaintiff's petition on the ground that no cause of action is set out therein against this defendant.

2

This defendant demurs to the allegations contained in paragraph five (5) of plaintiff's petition on the grounds that said allegations fail to set forth what the assets and liabilities of Auto Mutual Indemnity Company consisted of and the amount of the same and for what purposes and means the assessment upon the policyholders were to be devoted, so as to put this defendant on notice. Defendant further demurs to the allegations contained in paragraph five (5) on the ground that plaintiff's petition fails to allege that this defendant had any knowledge or notice of the things therein alleged.

3

This defendant demurs to the allegations contained in paragraphs three (3), six (6), seven (7), and eight (8) of plaintiff's petition on the ground that said paragraphs and said petition fail to allege that this defendant had any notice of the facts alleged in each of said paragraphs, and upon the

further ground that the allegations contained in said paragraphs set forth mere conclusions of the pleader and fail [fol. 75] to set forth therein or attach to said petition any copy of the orders and reports referred to in said paragraphs.

## 4

This defendant demurs to the allegations contained in paragraph thirteen (13) of plaintiff's petition on the grounds that the insurance laws of the State of New York that plaintiff specially pleads in said paragraph is a requirement of the law of the State of New York different from that imposed by the laws of this State and of which this defendant had no notice at the time of the issuance to it of its policy designated as policy No. AC 31968, either in said policy or the laws of this State.

Defendant further demurs to the aforesaid allegations contained in said paragraph thirteen (13) of plaintiff's petition on the ground that the insurance contracts set forth in plaintiff's petition were intended to have effect in the State of Georgia and were executed in the State of Georgia in conformity to the laws of the State of Georgia and the aforesaid specially pleaded statutes of the State of New York have no force and effect in the State of Georgia.

(5 & 6 omitted.)

## 7

This defendant further demurs to plaintiff's petition on the ground that said petition sets forth a misjoinder of parties.

Wherefore, this defendant prays that these its several grounds of demurrer be sustained and that plaintiff's petition be dismissed with all costs upon plaintiff.

Reynolds & Brandon, Attorneys for East & West Motor Lines, Inc.

[File endorsement omitted.]

[fol. 76] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 6, 1939

1

Now comes the defendant named above, H. L. Bass, as Bass Bus Line and demurs generally to the petition in said case for that said petition does not set out a cause of action against him.

2

And this defendant demurs specially to the said petition for the reason that the petition does not set out the policy of insurance that plaintiff contends or claims that this defendant is indebted upon, or in consequence of.

3

Wherefore, this defendant H. L. Bass prays that said petition be dismissed as to him.

Carlisle Cobb, Attorney for Defendant.

[File endorsement omitted.]

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[fol. 77] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER OF DEFENDANTS ROY R. REAGIN, GEORGIA MOTOR EXPRESS, INC., S. S. SALE, D/B/A SALE TRANSFER COMPANY AND SOUTHEASTERN STAGES, INC.—Filed November 4, 1939

Now come the named defendants and demur to the petition as follows:

1. The said petition contains a misjoinder of parties defendant.

2. The said petition contains a misjoinder of parties defendant because there is not any joint concert of action or any other joint action alleged on the part of these defendants or any of them, and also on the part of other defendants named in said petition. All of the contracts and agree-

ments of each of the defendants were separate and distinct from those of the others.

3. The said petition contains a misjoinder of causes of action.

4. The said petition contains a misjoinder of causes of action because there is not any joint concert of action or any other joint action alleged on the part of these defendants or any of them, and also on the part of other defendants named in said petition. All of the contracts and agreements of each of the defendants were separate and distinct from those of the others.

5. These defendants demur to paragraphs 6, 7, 8, 9 and 10 of the petition upon the ground that it is nowhere alleged therein whether or not the said purported assessment has been appealed to any court having appellate jurisdiction over the acts and orders therein mentioned, and it has not [fol. 78] been alleged whether or not the said assessment has thus become final.

Wherefore, these defendants pray that these their demurrers be inquired into by the court and sustained, and that an appropriate order be taken.

Howell & Post, Attorneys for Defendants Roy R. Reagin, Georgia Motor Express, Inc., S. S. Sale, d b/a Sale Transfer Company and Southeastern Stages, Inc.

[File endorsement omitted.]

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[fol. 79] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 6, 1939

And now comes the defendant, Eveready Cab Company, named as one of the defendants in the above captioned case, and subject to its plea to the jurisdiction, and without waiving its plea to the jurisdiction heretofore filed, and before filing its answer herein, files this its demurrer and for grounds of demurrer says:



## 1

This defendant demurs generally to said petition as a whole, for the reason that said petition fails to set out any cause of action against this defendant and that for said reason said petition should be dismissed.

## 2

This defendant demurs generally to said petition and says that there is a misjoinder of parties defendant in said petition, and a misjoinder of causes of action in said petition, and that the petition should be dismissed.

(3 to 15 inclusive, omitted.)

## 16

Defendant demurs specially to paragraph fourteen of said petition in that the pleader admits that this defendant is a resident of Clarke County and alleges no fact or thing to show the jurisdiction of this court of either the person of this defendant or of the subject matter of said suit; in that no policy or contract or other instrument upon which this action is based is attached to or embodied in said paragraph or petition showing that this defendant was or is a member of said company, or was or is governed by the rules, regulations, laws, or by-laws or constitution of said [fol. 80] company; in that nothing is alleged in or attached to said paragraph showing any liability of any nature whatsoever to the superintendent or anyone else; and that said entire paragraph fourteen should be stricken from said petition.

## 17

Defendant demurs specially to paragraph sixteen of said petition in that the pleader admits that this defendant is a resident of Clarke County, Georgia, and nothing is alleged or shown in said paragraph why the superior court of Clarke County should not have jurisdiction of this defendant and of the subject matter of said suit, instead of this court; and, in that nothing is alleged therein, no account or bill of particulars or anything else attached thereto, or any reason given why plaintiff should be entitled to any judgment or decree against this defendant; and that this

paragraph in so far as it concerns this defendant should be stricken.

Erwin & Nix, Attorneys for Eveready Cab Company.

Athens, Georgia.

[File endorsement omitted.]

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[fol. 81] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURREE BY J. A. BOOKER, DOING BUSINESS AS SAVANNAH BEACH BUS LINE AND/OR ATLANTIC STAGES—Filed November 6, 1939

Comes now J. A. Booker, trading as aforesaid, one of the defendants in the above case and by way of demurrer to the petition, says:

1. The petition sets forth no cause of action against this defendant.
2. No copy of the insurance contracts alleged to have been purchased by this defendant are attached to the petition.
3. It does not appear from the petition, either by excerpts from an insurance contract purchased by this defendant or otherwise, how and what manner this defendant became subject to assessment as alleged.
4. It does not appear from the petition when or in what manner this defendant ceased to be a member of Auto Mutual Indemnity Company, if, as alleged, this defendant was at one time such member.

Wherefore this defendant prays that these demurrers be sustained and that said case be dismissed as to him at plaintiff's cost.

O. E. Bright & Perry Brannen, Attorneys for J. A. Booker.

[fol. 82] [File endorsement omitted.]

## IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 8, 1939

Now comes the defendant, Fletcher T. Kaylor, doing business under the trade name of Kaylor Transfer Company, and files this his demurrer to the petition heretofore filed in the above stated case and for grounds of demurrer says:

1

That the petition as set forth and as served on this defendant fails to set forth a cause of action and should therefore be dismissed.

Wherefore, defendant prays that his demurrer be sustained.

Poykin & Boykin, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 83] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 9, 1939

Now comes J. F. Murray, doing business as the Georgia Alabama Coach Line, one of the defendants in the above styled case, and files this his demurrer to the petition of the plaintiff, and for reasons therefor shows to the court the following:

1

This defendant demurs generally on the ground that the allegations of the petition set forth no cause for action.

(2 to 11, both inclusive, omitted.)

W. L. Bryan, Samuel H. Wilds, Attorneys for Defendant J. F. Murray.

Business Address: 1311 Wm-Oliver Bldg., Atlanta, Georgia. Telephone: Main 2574.

[File endorsement omitted.]

[fol. 84] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 29, 1939

Now comes Kaler Produce Company, Cox Brothers Undertakers, Atlanta-Macon Motor Express, Inc., and Southeastern Motor Lines, Inc. and or Cedartown Bus Lines, and file these their demurrers in the above captioned case, and for grounds thereof show:

1

That said petition sets forth no cause of action, either in law or in equity against any of said defendants.

2

Because there is a misjoinder of parties defendant in said case, and that these defendants cannot be joined, either with each other or with other defendants named in this action.

3

Because plaintiff's petition is predicated upon a certain order of the courts of New York purporting to levy an assessment against each of these defendants, but it does not appear from plaintiff's petition that these defendants, or any of them, were parties to said proceedings in the courts of New York, nor served with process, either upon these defendants, or upon any officer or agent of these defendants within the State of New York and consequently such assessments are not binding upon any of these defendants.

4

Defendants demur to paragraphs five, six, seven, eight, nine and ten of plaintiff's petition, which paragraphs refer to a report filed by the superintendent of insurance in a case pending in the courts of New York and the order of the court thereon purporting to assess these defendants upon [fol. 85] the following grounds:

(a) Because said allegations are irrelevant and immaterial in this action.

(b) Because these defendants are not bound, either by the report of said superintendent of insurance or by the

order of the courts of New York thereon, these defendants not appearing to have been parties to said proceedings nor served with process, nor in any other way being subject to the orders of the said New York court for any purpose and particularly not subject thereto for the purpose of any order or judgment which would result in a judgment in personam against said defendants in this case.

(c) Because it does not appear from plaintiff's petition that these defendants, or any of them, agreed to pay any such assessments nor received their policies with knowledge or notice of any right of the plaintiff to assess them and consequently said assessments are not binding upon any of these defendants.

## 5

Defendants move to strike paragraph nine of plaintiff's petition upon the ground that it does not appear that they were legally served with order to show cause therein referred to, nor that the said Supreme Court of New York had any jurisdiction over these defendants.

## 6

Defendants demur to paragraph ten upon the ground that the New York law referred to is not binding upon any of these defendants, nor was the notice therein referred to a legal notice under the laws of this State, nor does plaintiff's petition show why said laws of New York are binding upon any of these defendants.

[fol. 86]

## 7

Defendants demur to paragraph twelve which alleges that defendants were members of said company, to wit: Auto Mutual Indemnity Company, upon the grounds:

(a) Said allegations are a conclusion of the pleader not authorized by other allegations in said petition.'

(b) Because the petition does not show that defendants at any time became members of said company, nor that any policy issued to and accepted by these defendants stipulated that they should be members, nor that any copy of the laws of New York or of the charter of Auto Mutual Indemnity Company or of the by-laws of Auto Mutual Indemnity Company were contained in any policy issued to any of these

defendants, either in whole or in part, and that unless the same appeared these defendants could not legally be considered as members of said company or said mutual insurance association under the laws of Georgia.

## 8

Defendants demur to paragraph thirteen of plaintiff's petition upon the grounds:

(a) The statute of New York therein quoted was not and is not binding upon these defendants for the following reasons:

1. It does not appear that these defendants ever agreed to be subjected to said statutes of the State of New York.

2. Because said statutes do not appear to have been incorporated in any policy of insurance issued to any of said defendants.

3. Because it appears that the policies of insurance issued to these defendants were issued in the State of Georgia and subject to the laws of Georgia and it does not appear that the laws of the State of New York could fix the liabilities of these defendants.

[fol. 87]

## 9

Defendants further show that the plaintiff is seeking to hold these defendants liable for a purported order and judgment of the Supreme Court of the State of New York which purports to levy an assessment against these defendants, and defendants say that any such assessment by the courts of New York are null and void, it not appearing that the courts of New York had any jurisdiction over these defendants and that such judgments upon such assessments would deprive each of these defendants of their rights under the constitution of the United States and the constitution of the State of Georgia, which reads as follows:

Article 1, section 1, paragraph 3 of the constitution of the State of Georgia provides:

"No person shall be deprived of life, liberty or property except by due process of law."

Article V of amendments to the constitution of the United States reads in part as follows:

“No person shall be deprived of life, liberty, or property without due process of law.”

## 10

That plaintiff's petition does not affirmatively show that these defendants were brought into the courts of the State of New York by due process of law, that no process from the courts of the State of New York was served upon any of these defendants in the State of New York, nor upon any agent designated by these defendants to be served by such process within the State of New York, nor served upon any officer or agent of any of said defendants residing in the State of New York nor otherwise served as contemplated by the aforesaid provisions of the constitution of the United States and of the constitution of the State of Georgia.

(Omit Para. 11.)

[fol. 88] Wherefore, defendants pray the court to sustain each and every ground of the foregoing demurrer and to strike plaintiff's petition and each and every portion thereof herein complained of.

Samuel A. Miller, Hooper & Hooper, William Woodruff, Attorneys for named Defendants.

[File endorsement omitted.]

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[fol. 89] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 28, 1939

Comes now J. Russell, doing business as Russell Transfer Company, one of the defendants named in the above stated case, and demurs to plaintiff's petition on the following grounds, to wit:

## 1

This defendant demurs to the petition on the ground that the allegations therein show no cause of action against this defendant and there is no cause of action set out in said petition.

## 2

This defendant demurs to the petition on the ground that it appears on the face thereof that the court has not jurisdiction of the person of this defendant.

## 3

This defendant demurs to the petition on the ground that it appears on the face thereof that the court has not jurisdiction of the subject of the action so far as this particular defendant is concerned.

## 4

The defendant demurs to the petition on the ground that it appears on the face thereof that said petition contains a misjoinder of parties defendant. There is a misjoinder of parties defendant because there is not any joint concert of action or any other joint action alleged on the part of these [fol. 90] various named defendants, including this defendant, or any of them. All of the contracts and agreements of each of the defendants were separate and distinct from those of the others.

## 5

The defendant demurs to the petition on the ground that it appears on the face thereof that said petition contains a misjoinder of causes of action. There is a misjoinder of causes of action because there is not any joint concert of action or any other joint action alleged on the part of these various named defendants, including this defendant, or any of them. All of the contracts and agreements of each of the defendants were separate and distinct from those of the others.

## 6

This defendant demurs to paragraphs 6, 7, 8, 9, and 10 of the petition upon the ground that it is nowhere alleged therein whether or not the said purported assessment has been appealed to any court having appellate jurisdiction over the acts and orders therein mentioned, and it has not been alleged whether or not the said assessment has thus become final.

Wherefore, this defendant prays the judgment of the court and that the petition be dismissed.

Earle Norman, Atty. for Deft. J. Russell, d/b/a Russell Transfer Co.

[File endorsement omitted]



[fol. 91] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER—Filed November 30, 1939

Now comes Continental Carriers, Inc. and files this its demurrers in the above captioned case, and for grounds thereof shows:

1

That said petition sets forth no cause of action, either in law or in equity against this defendant.

2

Because there is a misjoinder of parties defendant in said case, and this defendant cannot be joined with the other defendants named in this action.

3

Because plaintiff's petition is predicated upon a certain order of the courts of New York purporting to levy an assessment against this defendant, but it does not appear from plaintiff's petition that this defendant was a party to said proceedings in the courts of New York, nor served with process, either upon this defendant, or upon any officer or agent of this defendant within the State of New York and consequently such assessments are not binding upon this defendant.

4

Defendant demurs to paragraphs five, six, seven, eight, nine and ten of plaintiff's petition, which paragraphs refer to a report filed by the superintendent of insurance in a case pending in the courts of New York and the order of the court thereon purporting to assess this defendant upon the following grounds:

(a) Because said allegations are irrelevant and immaterial in this action.

(b) Because this defendant is not bound, either by the [fol. 92] report of said superintendent of insurance, or by the order of the courts of New York thereon, this defendant not appearing to have been a party to said proceedings nor

served with process, nor in any other way being subject to the orders of the said New York court for any purpose and particularly not subject thereto for the purpose of any order or judgment which would result in a judgment in personam against said defendant in this case.

(c) Because it does not appear from plaintiff's petition that this defendant agreed to pay any such assessment nor received its policy with knowledge or notice of any right of the plaintiff to assess it and consequently said assessment is not binding upon this defendant.

## 5

Defendant moves to strike paragraph nine of plaintiff's petition upon the ground that it does not appear that it was legally served with order to show cause therein referred to, nor that the said Supreme Court of New York had any jurisdiction over this defendant.

## 6

Defendant demurs to paragraph ten upon the ground that the New York law referred to is not binding upon this defendant, nor was the notice therein referred to a legal notice under the laws of this State, nor does plaintiff's petition show why said laws of New York are binding upon this defendant.

## 7

Defendant demurs to paragraph twelve which alleges that defendant was a member of said company, to wit, Auto Mutual Indemnity Company, upon the grounds:

(a) Said allegations are a conclusion of the pleader not authorized by other allegations in said petition.

(b) Because the petition does not show that defendant [fol. 93] at any time became a member of said company, nor that any policy issued to and accepted by said defendant stipulated that it should be a member, nor that any copy of the laws of New York or of the charter of Auto Mutual Indemnity Company or of the by-laws of Auto Mutual Indemnity Company were contained in any policy issued to this defendant, either in whole or in part, and that unless the same appeared, this defendant could not legally be considered as a member of said company or said mutual insurance association under the laws of Georgia.

## 8

Defendant demurs to paragraph thirteen of plaintiff's petition upon the grounds:

(a) The statute of New York therein quoted was not and is not binding upon this defendant for the following reasons:

1. It does not appear that this defendant ever agreed to be subjected to said statutes of the State of New York.

2. Because said statutes do not appear to have been incorporated in any policy of insurance issued to this defendant.

3. Because it appears that the policy of insurance issued to this defendant was issued in the State of Georgia and subject to the laws of Georgia and it does not appear that the laws of the State of New York could fix the liability of this defendant.

## 9

Defendant further shows that the plaintiff is seeking to hold this defendant liable for a purported order and judgment of the Supreme Court of the State of New York which purports to levy an assessment against this defendant, and defendant says that any such assessment by the courts of New York are null and void, it not appearing that the courts of New York had any jurisdiction over this defendant and that such judgment and assessment would deprive this defendant of its rights under the constitution of the United States and the constitution of the State of Georgia, which reads as follows:

Article 1, section 1, paragraph 3 of the constitution of the State of Georgia provides:

"No person shall be deprived of life, liberty or property except by due process of law."

Article V of amendments to the constitution of the United States reads in part as follows:

"No person shall be deprived of life, liberty, or property without due process of law."

## 10

That plaintiff's petition does not affirmatively show that this defendant was brought into the courts of the State of

New York by due process of law, that no process from the courts of the State of New York was served upon this defendant in the State of New York, nor upon any agent designated by this defendant to be served by such process within the State of New York, nor served upon any officer or agent of this defendant residing in the State of New York nor otherwise served as contemplated by the aforesaid provisions of the constitution of the United States and of the constitution of the State of Georgia.

(11 omitted.)

Wherefore, defendant prays the court to sustain each and every ground of the foregoing demurrer and to strike plaintiff's petition and each and every portion thereof herein complained of.

Hooper & Hooper, Samuel A. Miller, Attorneys for  
Named Defendant.

[File endorsement omitted.]

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[fol. 95] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER OF DEFENDANT WEATHERS BROS. TRANSFER COMPANY, INC.—Filed November 30, 1939

Now comes the above defendant and demurs to the petition as follows:

1. The said petition contains a misjoinder of parties defendant.

2. The said petition contains a misjoinder of parties defendant because there is not any joint concert of action or any other joint action alleged on the part of these defendants or any of them, and also on the part of other defendants named in said petition. All of the contracts and agreements of each of the defendants were separate and distinct from those of the others.

3. The said petition contains a misjoinder of causes of action.

4. The said petition contains a misjoinder of causes of action because there is not any joint concert of action or

any other joint action alleged on the part of these defendants or any of them and also on the part of other defendants named in said petition. All of the contracts and agreements of each of the defendants were separate and distinct from those of the others.

5. This defendant demurs to paragraphs 6, 7, 8, 9, and 10 of the petition upon the ground that it is nowhere alleged therein whether or not the said purported assessment has been appealed to any court having appellate jurisdiction over the acts and orders therein mentioned, and it has not [fol. 96] been alleged whether or not the said assessment has thus become final.

Wherefore, this defendant prays its demurrer be inquired into by the court and sustained, and that an appropriate order be taken.

J. L. Flemister, Attorney at Law for Weathers Bro.  
Transfer Co., Inc.

[File endorsement omitted.]

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[fol. 97] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER OF BATEMAN COMPANY, INC., DOWNIE BROTHERS  
CIRCUS, KINNETT-ODOM COMPANY, INC., AND SOUTHERN  
STAGES, INC.—Filed December 14, 1939

Come now the above named defendants, and demur to plaintiff's petition on the following grounds:

1

Generally because said petition sets out no cause of action either in law or in equity.

2

Generally because said petition sets out no contract or other liability to assessment as against these defendants.

3

Generally because said petition sets forth no validly made assessment against these defendants who appear on

the face of said petition to be and to have been non-residents of the State of New York and who are not alleged in said petition to have been parties to or to have been brought before the court in the proceedings in the State of New York in which the assessment relied upon is alleged to have been made.

## 4

Generally because it does not appear from said petition that these defendants are or were members of the Auto Mutual Indemnity Company subject to assessment, the allegation contained in paragraph 12 that the defendants were members during the year prior to November 10, 1937, merely stating a conclusion on the part of the pleader un-[fol. 98] supported by any facts alleged.

## 5

Generally because said petition shows on its face that the assessment made against these defendants was without notice to them, and because it appears that these defendants have not had their day in court, and because the proceedings in the Supreme Court of the State of New York, County of New York, wherein an assessment was made or attempted to be made against these defendants, was without due process of law and was repugnant to and violative of the due process clauses of the constitutions of the United States and of the State of Georgia, to wit, the 5th and 14th amendments to the constitution of the United States, and article 1, section 1, paragraph 3 of the constitution of the State of Georgia.

## 6

Generally because said petition shows on its face that the superior court of Fulton County has no jurisdiction over these defendants, it appearing therefrom that these defendants are each and all residents of Bibb County, Georgia.

## 7

Generally because no facts are alleged in said petition to show that there is or was in force in the State of New York any statute imposing any liability to assessment against these defendants as members or as policyholders of said Auto Mutual Indemnity Company under which these defend-

ants were subject to assessment or under which an assessment could be made against these defendants, or showing that any such statute became a part of any contract between these defendants and the company, or was binding upon these defendants, or that these defendants became members of the company so as to be bound by any such statute or that these defendants by contract assumed any such liability, such general averments as are to be found in the petition [fol. 99] constituting merely conclusions of the pleader unsupported by any facts alleged.

## 8

Generally because it does not appear from said petition that the policies of insurance issued by the company to these defendants were issued within the territorial limits of the State of New York or were contracts made within the State of New York or insured property located within the State of New York, and because no facts are alleged to show that the contracts were entered into subject to the laws of the State of New York so as to make any such statute or other law of the State of New York a part of such contract.

## 9

Specially because there is a misjoinder of causes of action, separate and distinct causes of action being asserted against separate and distinct parties, and particularly as respects the alleged "other indebtedness" of \$245.00 alleged to be due by Downie Brothers Circus.

## 10

Specially because there is a misjoinder of parties defendant, separate and distinct causes of action being joined against separate and distinct parties.

(Omit 11 to 20, both inclusive.)

Wherefore, defendants pray that these their grounds of demurrer be sustained.

Martin, Martin & Snow, Macon, Ga.; Jones, Jones  
& Sparks, Macon, Ga., Attorneys for Defendants.

[File endorsement omitted.]



[fol. 100] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ADDITIONAL DEMURRER—Filed December 27, 1939

Now comes the defendant, H. L. Bass as Bass Bus Lines, in the case stated above, without waiving jurisdiction in said case but expressly denying the jurisdiction of the said court, within the appearance term of said court, and adds the following additional grounds to his demurrer heretofore filed in said case, to wit:

1

It appears from the allegations in said petition that there are no joint obligations on the part of the defendants in said case, and that this defendant is a resident of Clarke County, Georgia, and therefore the superior court of Fulton County, Georgia, has no jurisdiction of this defendant, and the case should be dismissed as to him.

2

It appearing from the allegations in said petition that this defendant was and is a resident of the State of Georgia when the alleged policy of insurance was written, on which the alleged assessments were made, it is not alleged whether or not this defendant purchased said policy of insurance in the State of Georgia, or the State of New York, or whether or not it was to be executed in the State of Georgia or New York. Neither is it alleged in said petition how, when or in what manner the said superintendent of insurance or the courts of the State of New York secured jurisdiction of this defendant in order to render a valid and binding order or judgment against him when he was a resident of Georgia.

[fol. 101]

3

That according to the allegations in said petition there are no joint obligations on the part of the defendants in this case, but each defendant's transaction was separate and independent, and therefore there is a misjoinder of parties and misjoinder of causes of action, and the said case should be dismissed as to this defendant.

(Omit 4.)



Wherefore, this defendant prays that this his demurrer be sustained and said case dismissed as to him.

Carlisle Cobb, G. N. Bynum, Thos. R. R., Attorneys  
for Defendant, H. L. Bass, as Bass Bus Lines.

[File endorsement omitted.]

[fol. 102] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ADDITIONAL DEMURRER—Filed August 14, 1940

Comes now J. Russell, doing business as Russell Transfer Company, one of the defendants in the above stated case, and the plaintiff having offered and had allowed, subject to demurrer, an amendment to his original petition in said case, and renews his demurrers general and special, heretofore filed, to the original petition, and to said petition as amended, and also demurs to said petition as amended on the following additional grounds, to wit:

1

The petition is defective and should be stricken, because:

(a) Plaintiff fails to allege the amount of the losses Auto Mutual Indemnity Company sustained during the time this defendant was a policyholder in said company:

(b) Plaintiff fails to allege that this defendant is being sued on an assessment covering losses sustained by Auto Mutual Indemnity Company during the time defendant was a policyholder in said company.

Wherefore, defendant prays the judgment of the court and that said petition as amended be dismissed.

Earle Norman, Attorney for Defendant.

[File endorsement omitted.]

[fol. 103] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ADDITIONAL DEMURRER—Filed August 12, 1940

Now come Kaler Produce Company, Cox Brothers, Undertakers, Atlanta-Macon Motor Express, Inc., Southern Motor Lines, Inc. and/or Cedartown Bus Line and Continental Carriers, Inc. and file this their demurrers to this plaintiff's petition, as amended, and for grounds of demurrer shows:

1

Said petition, as amended, sets forth no cause of action against any of these defendants.

2

The allegations of plaintiff's petition, as amended, are not sufficient to show that any of said defendants ever became a member of Auto Mutual Indemnity Company of New York, alleged mutual insurance company, nor that any of said defendants became liable to assessments as prayed for, nor that any of said defendants, at the time of accepting any policy of insurance, agreed to become members of said alleged association, nor agreed to be bound by the statutes of New York, the charter of said company, nor the by-laws of said company, nor that said defendants had either actual or constructive knowledge of the laws of New York, the by-laws or charter of said company, nor of any assessment provisions contained in any of such laws or in the charter or in the by-laws of said company.

3

Defendants specially demur to paragraph two of plaintiff's petition, as amended, and to exhibit "A" attached [fol. 104] thereto, upon the ground that said allegations are irrelevant and immaterial, it not sufficiently appearing from plaintiff's petition that any defendant is or was bound by the provisions of said charter.

4

Defendants specially demur to paragraph three of plaintiff's petition, as amended, and to exhibit "B" attached

therefo, upon the ground that said allegations are irrelevant and immaterial, it not sufficiently appearing from plaintiff's petition that the laws of New York, as therein referred to, became a part of the alleged contract between said insurance company and any of said defendants, nor that any of said defendants ever had knowledge, actual or constructive, of said laws, or ever agreed to be bound thereby.

## 5

Defendants demur to paragraph four of plaintiff's petition as amended, and to exhibit "B" attached thereto, upon the ground that these defendants are not concerned therewith because said petition shows said defendants have never agreed to be bound by any assessment by the courts of New York or otherwise.

## 6

Defendants demur to paragraph six of said petition, as amended, and to exhibit "E" attached thereto, upon the ground that said petition shows none of these defendants have ever agreed to be bound by any assessment as therein referred to, nor are they legally bound by the terms of said order.

## 7

Defendants demur to paragraph nine of plaintiff's petition, as amended, and to exhibit "F" attached thereto, upon the ground that said petition shows none of these defendants have ever agreed to be bound by the assessments therein referred to, nor are they legally bound under the [fol. 105] allegations of plaintiff's petition to pay the same.

## 8

Defendants demur to paragraph eleven of said petition, upon the ground that said petition shows none of these defendants have ever agreed to submit themselves to the insurance laws of the State of New York, nor contracted to pay any of the assessments therein referred to, nor are they legally bound to pay the same.

## 9

Defendants demur to paragraph twelve of plaintiff's petition, as amended, and to various parts therein referred to

in this ground of demurrer, upon the following grounds, to wit :

(a) Because the policy of insurance referred to does not contain any provisions rendering any of these defendants liable to an assessment, nor sufficiently constituting any contract by any of said defendants, express or implied, to be liable for any assessment.

(b) Because it appears that said policies are ordinary insurance policies, providing for premiums, and not containing any agreements to pay assessments, and not containing any language subjecting the holders thereof to any liability under the laws of New York, or the charter or by-laws of said company, or otherwise.

(c) Because it does not definitely appear during what period of time each of these defendants are alleged to have been members of said alleged mutual insurance company and therefore it does not appear what amount of assessment they would be liable for, if in fact liable at all.

(d) Because the alleged "notice to policyholders" copied in said paragraph is shown to have been upon the back of said policies, and it does not appear that any reference was made to the same in the body of the policies and hence [fol. 106] said portion is not admissible in evidence nor binding on these defendants. Said provisions are further inadmissible and irrelevant because they do not make any agreement upon the part of any defendant to pay any assessment, but the language thereof is vague and ambiguous, and if construed according to the rules of law, expressly make said policy as a nonassessable policy.

(e) Because the by-laws of the company referred to in said paragraph are irrelevant and immaterial, it not appearing that these defendants, or any of them, were in any manner bound by said by-laws, nor given legal notice of the existence of the same.

# 10

Defendants demur to paragraph thirteen of plaintiff's petition, as amended, upon the grounds :

(a) Because, the by-laws therein referred to were not made a part of the policy nor expressly referred to therein, nor by implication made a part of said policy nor are they

legally binding upon any of these defendants, but on the other hand, are irrelevant and inadmissible.

(b) Because all references to the New York law contained in said paragraph thirteen should be stricken, it not appearing that said defendants, or any of them, were given legal notice of the laws of New York, nor did they agree to be bound by the terms thereof, nor are said laws binding upon these defendants.

Wherefore, these defendants move the court to strike plaintiff's petition, as amended, and each and every portion or paragraph, or exhibit in connection therewith, upon the grounds and for the reasons as set forth in this demurrer.

Wm. Woodruff, Hooper, Hooper & Miller, Attorneys  
for Defendants above named.

[fol. 107] Due and legal service of the foregoing demurrers acknowledged, copy received, all other and further service waived.

Powell, Goldstein, Frazer & Murphy, Attorneys for  
Plaintiff.

This August 9th, 1940.

[File endorsement omitted.]

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[fol. 108] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

ADDITIONAL DEMURRER—Filed August 10, 1940

Come now Bateman Company, Inc., Downie Brothers Circus, Kinnett-Odom Company, Inc., and Southern Stages, Inc., and renew each and every ground of their demurrers, both general and special, to plaintiff's petitioner as amended, and in addition to the grounds set forth in the original demurrer add the following grounds:

1

Generally because it affirmatively appears from paragraph 12 of said petition as amended that there is no reference in the policy to the power of the Auto Mutual Indemnity

Company to assess its policyholders except a reference printed on the back of the policy which is not a part of the policy itself and which is not notice to any of these defendants, as they are bound only by the contents of the policy contract.

## 2

Generally and specially to paragraph 12 as amended because neither said paragraph nor the exhibit attached which is referred to in said paragraph shows where said policies were issued, and it does not affirmatively appear that any of said insurance policies were issued within the State of New York, and because no facts are alleged to show that the contracts were entered into subject to the laws of the State of New York so as to make any statute or other law of that State a part of such contract.

## 3

Generally as to Downie Brothers Circus and Southern [fol. 109] Stages, Inc., because it affirmatively appears from the petition as amended that when a member of the Auto Mutual Indemnity Company ceased to be a policyholder, he at the same time ceased to be a member of the corporation, and this being true, neither of these two defendants was a member at the time of the institution of any of the proceedings instituted in the courts of the State of New York, and neither of these defendants was represented in said proceedings by said insurance company, or otherwise, so that neither of these two defendants is in any way bound or affected by said proceedings.

## 4

Specially as to Bateman Company, Inc., because it affirmatively appears from the petition as amended that Bateman Company, Inc., if it ever was a member of said insurance company, ceased to be a member as respects all except three of the policies enumerated opposite its name in paragraph 14 of the petition before November 10, 1937, and, as to all except three of said policies, was not a member on that date or at the time of the institution of any of the proceedings in the courts of the State of New York, and was not represented in said proceedings by said insurance company or otherwise, so that said Bateman Company, Inc. is not in

any way bound or affected by said proceedings as respects any of said policies except the last three, if indeed Bateman Company, Inc. was ever at any time a member.

## 5

Defendants demur specially to paragraph 13 of the petition as amended and particularly to sections b, c and d wherein plaintiff attempts to plead the law of New York, for that the same constitute conclusions of the pleader unsupported by any facts alleged, and for the further reason that it affirmatively appears from the petition that the defendants were not members of said insurance company and [fol. 110] did not contract with reference to or subject to the laws of the State of New York and are not bound or affected thereby, it not appearing that the policies issued to defendants were issued or delivered or received by defendants or contracted for by defendants within the territorial limits of the State of New York.

## 6

Generally to said petition as amended because it affirmatively appears therefrom that on the 24th day of November, 1937, the Auto Mutual Indemnity Company was ordered, adjudged and decreed to be insolvent, and on the same day, by the same order, the corporate charter of the Auto Mutual Indemnity Company was forfeited and annulled and the corporation was dissolved. On and after said date said insurance company ceased to be a party to said proceedings and at no time thereafter were these defendants represented in said proceedings by said insurance company. All of the proceedings which resulted in fixing and levying an assessment against the policyholders of said company were subsequent to the time when said corporation ceased to be a party to said proceedings; so that these defendants were not represented in said proceedings by themselves or by said insurance company and are not bound or affected by the same.

Wherefore, Defendants pray that these their grounds of demurrer be sustained.

Martin, Martin & Snow, Jones, Jones & Sparks, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 111] IN SUPERIOR COURT OF FULTON COUNTY

No. 127,387

LOUIS H. PINK, As Superintendent,

vs.

A. A. A. HIGHWAY EXP., INC., et al.

ORDER SUSTAINING DEMURRERS AND DISMISSING PETITION—  
August 22, 1940

This case coming on for a hearing on general and special demurrers of

Service Coach Line, Inc.  
H. A. Adams, trading as Adams Transfer Co.  
A. A. A. Highway Express, Inc.  
East and West Motor Lines, Inc.  
H. L. Bass, as Bass Bus Line.  
Roy H. Reagin.  
Georgia Motor Express, Inc.  
S. S. Sale, Sale Transfer Co.  
Southeastern Stages, Inc.  
Eveready Cab Co.  
J. H. Booker, d/b/a Sav. Beach Bus Line and/or  
Atlantic Stages.  
Fletcher T. Kaylor, d/b/a Kaylor Transfer Co.  
J. T. Murray, d/b/a Georgia Alabama Coach Line.  
Kaler Produce Co.  
Cox Bros. Undertaking Co., Inc.  
Atlanta Macon Motor Express, Inc.  
Southeastern Motor Lines, Inc., and/or Cedartown  
Bus Line.  
J. Russell, d/b/a Russell Transfer Co.  
Continental Carriers, Inc.  
Bateman Co., Inc.  
Downie Bros. Circus.  
Kinnett Odum Co., Inc.  
Southern Stages, Inc.  
Marchman's Drive Yourself, Inc. and/or Dime Taxi  
Co. and Yellow cabs,

to plaintiff's petition, after argument of counsel, and upon due consideration of plaintiff's petition, as amended, together with all exhibits attached, particularly the copy of



contract with defendants, it is considered, ordered, and adjudged that the petition as amended fails to set forth a cause of action, it being the judgment of the Court that said petition fails to make out a case of liability for assessment against the several defendants. The general demurrers are therefore sustained, and the plaintiff's petition is dismissed.

This the 22nd day of August, 1940.

(Signed) Paul S. Etheridge, Judge, S. C. A. C.

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[fol. 112] IN SUPERIOR COURT OF FULTON COUNTY

No. 127,387. Fulton Superior Court

LOUIS H. PINK, as Superintendent,

vs.

A. A. A. HIGHWAY EXP. INC., et al.

ORDER AMENDING ORDER SUSTAINING DEMURRERS—August 23,  
1940

The order passed August 22, 1940, sustaining the general demurrers in the foregoing case, is hereby amended as follows:

It is considered, ordered, and adjudged that this case is a bill in Equity; that there is no mis-joinder of parties, or of causes of action, and those demurrers directed against the petition on the ground of mis-joinder are overruled.

This the 23rd day of August, 1940.

Paul S. Etheridge, Judge, S. C. A. C.

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[fol. 113] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 114] [File endorsement omitted.]

No. 13549

PINK, Superintendent,

v.

A. A. A. HIGHWAY EXPRESS INC. et al.

OPINION—January 16, 1941

By the COURT:

1. Construing the amended petition as a whole, most strongly against the pleader, the averment therein that "all the defendants were policyholders and members of the company during the year prior to November 10, 1937," is held to be an averment that the defendants were members because they were policyholders.

2. When a court of the domicile of an insolvent mutual insurance corporation, having acquired jurisdiction thereof, proceeds according to the applicable statutes to determine the necessity for, and to fix by its decree, the amount of an assessment against those who became members of such corporation in accordance with the laws of the State under which it was organized, whether or not such decree is conclusive as to the necessity for and the amount of such assessment when asserted against policyholders who were non-residents of the domiciliary State, not personally served, and who did not personally appear therein, it is not necessary to decide.

3. Such a decree, as to policyholders who were not made parties to the original proceedings, was not conclusive on the question whether their relation to the corporation was such as to subject them to such liability.

4. If liable at all, the defendants are so only because their contracts constituted them members of the corporation. Whether or not these made them personally liable for the assessments will be determined by the law of this State when such liability is asserted against them in the courts of [fol. 116] this State, in the absence of any showing that the contracts were entered into in some other State or were to

be performed in some other State, and the law of such other State, if any, governing contracts of this character not being set forth.

5. Applying the law as found in our statutes and as expounded by our courts and in harmony with the principles of general law not in conflict therewith, it must be held that the mere acceptance of a policy of indemnity insurance issued for a stated premium, by a company that bears the name "mutual," but is not shown to have a lodge system with ritualistic form of work and representative form of government, with a statement in the policy that by acceptance of the policy the insured agrees that it "embodies all agreements existing between himself and the company or any of its agents relating to this insurance," does not make the policyholder a member liable to assessment in accordance with the laws of the State of the company's domicile, although on the back of the policy under the heading, "Notice to policyholders," there is printed a statement that "The contingent liability of the named insured under this policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limits provided by the insurance law of the State of New York, or of the State in which the insured is domiciled and/or this policy is written," there being in the face of the policy no reference to any contingent liability or assessment, or to any law providing for such. This is true notwithstanding the charter of the company provides that the members shall be the policyholders, that its by-laws provide that every member shall be liable to assessment, and that the insurance law of the State of the company's domicile contains a like provision.

6. The court did not err in sustaining the general demurrer.

[fol. 117] This suit was brought by Louis H. Pink, superintendent of insurance of the State of New York, jointly against A. A. A. Highway Express Inc. et al., the defendants being approximately twenty-five in number, seeking to collect from them assessments levied in New York against all members of Auto Mutual Indemnity Company, an insolvent insurance corporation, the defendants in this case being alleged to be such members. The defendants are

residents of the State of Georgia, and one or more of them residents of Fulton County, where the suit was instituted. The allegations of the petition were substantially as follows: The Auto Cab Mutual Indemnity Company was incorporated under article 10-B of the insurance law of the State of New York, on May 26, 1932, as a mutual automobile casualty insurance company. With approval of the Insurance Department of the State of New York, its name was changed, on February 21, 1933, to Auto Mutual Indemnity Company, and is hereinafter referred to as the company. All provisions of the charter and amendment relevant to the issues in this case were attached as an exhibit. On the application of the superintendent of insurance of the State of New York, an order was made by the Supreme Court of that State, placing the company in rehabilitation pursuant to article 11 of the insurance law of that State, the order being duly filed of record. All sections of article 11 and all of the aforesaid order relevant to the issues in the case were attached as exhibits. The company being insolvent, it was placed in liquidation on that ground, by an order of the Supreme Court of the State of New York, made, entered, and filed in the office of the clerk of the New York court on November 24, 1937, and all of that order relevant to the issues in the case was attached to the petition as an exhibit. The liquidation proceedings were entitled "In the matter of liquidation of the Auto Mutual Indemnity Company," and those proceedings are still pending.

[fol. 118] Pursuant to section 422 of the insurance law of the State of New York, on February 4, 1938, which was within one year from the date of the entry of the orders of rehabilitation and liquidation, the superintendence of insurance filed in said proceedings a report setting forth the reasonable value of the assets of the company, its probable liabilities, and the probable necessary assessment to pay all allowed claims in full. That report being quite voluminous, it was not set out or attached as an exhibit, but petitioner promised to introduce it into evidence at the trial. Upon the basis of that report, pursuant to section 422, an order was made by the New York Supreme Court, on February 7, 1938, directing that an assessment of forty per cent of premiums earned during the preceding year be levied against all members of the company, against whom an assessment might have been levied on November 10, 1937, the

date of the commencement of the proceedings against the company. This order was duly filed, a copy of it being attached to the petition as an exhibit. The superintendent thereupon computed the amount of assessment due from each policy, and, pursuant to section 432 of the insurance law of New York, computed the amount of indebtedness of each member to the company apart from the indebtedness for assessment. These computations were attached as an exhibit, showing the names of the defendants, their residences, the numbers of their policies, the premiums earned, and the amount of assessment for which such member was liable. On the basis of the report an order was made, August 12, 1938, which, together with the petition, report, and exhibits of the superintendent, was duly filed in the office of the clerk of the New York court, the order directing each member during the year previous to November 10, 1937, to pay the amount assessed against him to the superintendent of insurance. The order further directed, that, [fol. 119] failing to make such payments, the members were to show cause, on September 29, 1938, why they should not be held liable to pay such assessments, together with costs, and why they should not be held liable to pay any other indebtedness which they might owe the superintendent of insurance, and why the superintendent should not have judgment therefor. This order was attached to the petition as an exhibit. Pursuant to section 422 of the insurance law of New York, notice of this order was mailed to all of the members of the company, including each of the defendants in this case. None of the defendants appeared to show cause, nor have they made payment as directed. All of them were policyholders of the company during some part of the year before November 10, 1937.

A copy of the policy issued to each of the defendants was attached, being merely a form policy, but alleged to be the type of policy contemplated in the court's order of February 7, 1938, above referred to. While these policies provided that the insured should be entitled to "an equitable participation in the funds of the company in excess of the amounts required to pay all policy and other obligations," etc., and were headed or captioned "Auto Mutual Indemnity Company (a mutual insurance company)," they did not otherwise contain any reference to the laws of the State of New York, or to any particular law of that State, or to

the charter or by-laws of the company, or to the policyholder as a "member," or to any liability for assessment. The policy declared that it embodied "all agreements existing between" the policyholder and the company, and mentioned nowhere that the assured would be liable for any assessment of any nature. It is true, on the back of the policy, but not in the face of the policy itself, there were printed paragraphs entitled, "What to do and what not to do in case of accident," "Safety code reminders," and "Notice to policyholders," each containing subparagraphs, and under the last-named heading the policyholder was notified that he was a "member" of the Auto Mutual Indemnity Company, and entitled to vote at all meetings of the company, and stating when and where those meetings would be held, and that "the contingent liability of the named insured under this policy shall be limited to one year from the expiration or cancellation hereof, and shall not exceed the limits provided by the insurance law of the State of New York." At the time each of the defendants purchased his policy and became a member of the Auto Mutual Indemnity Company there was in force a statute of the State of New York, which (as the petitioner alleged), under the statutes and court decisions of New York, became a part of his contract binding upon him, to wit, section 346 of the insurance law of the State of New York, which provides: "The corporation shall in its by-laws and policies fix the contingent mutual liability of the members for the payment of losses and expenses not provided for by its admitted assets; but such contingent liability of a member shall not be less than an amount equal to twice the amount of, and in addition to, the cash premium provided for in the policy, except that a corporation which has amended its charter to provide for the transaction of additional kinds of insurance may amend its by-laws to provide that the contingent mutual liability of a member shall not be less than an amount equal to, and in addition to, the cash premium provided for in the policy. Every member shall be liable to pay, and shall pay his proportionate part of any assessment which may be laid by the corporation in accordance with law and his contract on account of losses and expenses incurred while he was a member, if he is notified of such assessment within one year after the expiration of his policy. All assessments, whether levied by the board of



directors, by the superintendent of insurance in the liquidation of the corporation, or otherwise, shall be for no greater amount than that specified in the policy or by-laws." The names and addresses of the defendants, the numbers of their policies, the period for which each was alleged to be [fol. 121] liable to assessment, and the amount of judgment prayed against each, was set forth in the petition. There was also attached a copy of a portion of the by-laws to the effect that "the members of the corporation shall be the policyholders herein," in accordance with the provision of the corporation's charter.

By amendment the plaintiff alleged that the action presents a common right to be established by the plaintiff against the several defendants named in the petition, and that it is proper that a court of equity determine the whole matter in one action; and that by so doing a multiplicity of actions will be avoided, speedy and effectual relief will be granted, and unnecessary costs will be obviated. By further amendment the petitioner averred that he would present to the court on the trial of the case the acts of the legislature of the State of New York, referred to in the petition, duly authenticated by the great seal of that State, and would present the records and judicial proceedings referred to, duly attested under the seal of the court, all as is provided by section 38-627 of the Code of Georgia, and by the United States Revised Statutes, section 905, title 28, section 687. Petitioner contended, that said public acts, judicial proceedings, and records of the State of New York are entitled to and should receive full faith and credit in the courts of this State and in this proceeding, as is specifically provided in section 38-627 of the Code of Georgia of 1933, and by article 4, section 1 of the constitution of the United States (Code, § 1-401); and that any judgment which denies or has the effect of denying to the judgments and statutes aforesaid, the full force and effect to which they are entitled under the constitution and laws aforesaid, abridges the privileges and immunities of petitioner as a citizen of the United States, contrary to the fourteenth amendment [fol. 122] of the constitution of the United States. Petitioner prayed that second originals issue directed to the sheriffs of all counties in which the defendants reside, for service upon every defendant residing outside of Fulton County; and that petitioner have judgment against each defendant for principal, interest, and costs.



The defendants filed general demurrers, which fall into two categories in so far as the defendants are concerned, as follows: that the policies issued to each of the defendants were not assessable, since they contained no provisions for assessment; and that some of the defendants were not policyholders of the Auto Mutual Indemnity Company at the time of its dissolution, and for that reason are not subject to assessment. The general demurrer of each defendant was sustained, and the plaintiff excepted.

GRICE, Justice:

1. The pronouncement made in the first headnote will not be discussed. See *Strickland v. Lowry National Bank*, 140 Ga. 653 (79 S. E. 539); *Anderson v. Anderson*, 150 Ga. 142 (103 S. E. 160).

2. Touching the proposition of law referred to in the second headnote, see *Swing v. Humbird*, 94 Minn. 1 (101 N. W. 938); *Hawkins v. Glenn*, 131 U. S. 319 (9 Sup. Ct. 739, 33 L. ed. 184); *Great Western Tel. Co. v. Purdy*, 162 U. S. 329 (16 L. ed. 810, 40 L. ed. 986); *Glenn v. Liggett*, 135 U. S. 533 (10 Sup. Ct. 867, 34 L. ed. 262); *Selig v. Hamilton*, 234 U. S. 652 (34 Sup. Ct. 926, 58 L. ed. 1518); and the authorities collected in *Chandler v. Peketz*, 197 U. S. 609 (56 Sup. Ct. 602, 180 L. ed. 881, and citations in the note. The rule referred to is based on the theory that in [fol. 123] litigation to which the corporation is a party its stockholders are represented by it to the extent that they are bound by any judgment rendered against the corporation in so far as it relates to corporate matters; and that the action of the court in determining the necessity for, and fixing the amount of, the assessments, is merely performing a duty which would have fallen on its directors had it continued to be a going concern; the court substituting its decree for the formal call of the directors, which call is ordinarily a prerequisite to fixing an individual liability on the stockholders. As shown by the citations above, the same principle has been applied to mutual assessment insurance companies; but, as indicated above, it is not necessary to decide whether the principle contended for is sound.

3. The turning point in the case is whether or not the defendants, who were not parties to the original proceeding, are so far concluded by the decree rendered therein

as to prevent them from showing that their relation to the corporation was not such as to subject them to liability for assessment. When we refer to their not being parties to the original proceeding, we mean that they were not personally served, and that they have not had their day in court for the purpose of asserting their non-liability. It is the insistence of the plaintiff, that these policyholders were represented in the New York litigation, and are bound by the decision of the court therein; and that while certain personal defenses are still available to them, they are not the type of defenses such as are here raised; that when it is admitted, as the demurrer does, that they were policyholders, they became members; and that the decree of the New York court adjudging that the members were liable to the assessments in the amount sued for was binding on them when sued by the superintendent of insurance seeking to recover a judgment therefor in personam against them. [fol. 124] Let us bear in mind that the rationale of the rule contended for, to wit, that the court of the domicile of an insolvent corporation the affairs of which are being administered by a receiver may determine that an assessment is necessary, and fix the amount of it. Although these defendants were not parties to the original proceeding, the corporation was. As to those policyholders not personally served in the New York court and who did not personally appear therein, all the decree could have done was to determine the necessity for and amount of assessment, and to call on the members to pay. This was all the directors could have done; and this was at most all the court could do, unless the policyholders were made parties to that proceeding, so as to be personally bound by other matters adjudicated therein. If in that suit it was asserted that certain policyholders were members of the company and were liable in a certain amount because they were members, and such policyholders were not personally served and did not appear, an adjudication that they were liable because under the New York law they were members is not conclusive on them. Whether they were members or not was vital on the question of their liability to assessment. On such an issue they are not bound until they have had an opportunity to contest it.

Counsel for the plaintiff take the position that to deny the element of conclusiveness to the decree of the New York

court upon the question of the liability of each of the defendants to assessments would be to refuse to give effect to the full-faith and credit-clause of the constitution of the United States. The answer to that contention is, that before that constitutional provision can become operative one must have had his day in court; and over against it we place the other guaranty, to wit, the due-process clause; and it is of the essence of due process that one must be [fol. 125] given an opportunity to be heard. *Walton v. Davis*, 188 Ga. 56, 62 (2 S. E. 2d, 603), and *cit.* In *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, *supra*, after holding that the order of assessment was conclusive and binding on every stockholder without personal notice to him, it was said: "But the order was not, and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense which he might have to an action upon that contract. In this action, therefore, brought by the receiver in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defense, going to show that he was not liable upon his contract of subscription."

Their liability to assessment depends upon whether or not they became members of the company. A person can not be made a member or stockholder of a corporation without his consent. 18 C. J. S., § 478, note 42, and *cit.* It was incumbent on the plaintiff to show that these defendants became members, in order to subject them to the payment of the assessment, the necessity for and amount of which was determined by the decree of the court wherein the corporation had its domicile. As to this, all that is shown is that they purchased a policy in a mutual insurance company, organized under the laws of the State of New York, which laws provide that a policyholder is a member and liable to assessment. This is not sufficient. *New York Life Insurance Co. v. Street* (Tex. Civ. App.), 265 S. W. 397, and *cit.* *Couch's Cyclopedia of Insurance Laws*, § 251 *et seq.*

[fol. 126] The Supreme Court of Minnesota had the identical question, in *Swing v. Humbird*, 94 Minn. 4 (101 N. W. 938). It was there ruled: "Action to recover upon an assessment of the policyholders of an insolvent mutual insurance company, made by a court having jurisdiction to wind up its affairs. *Held*: 1. Such assessment is not conclusive upon any policyholder as to the question whether his relation to the company was such as to subject him to liability for an assessment." In *Shuey v. Adair*, 24 Wash. 378 (64 Pac. 536), in answering the contention of the receiver that the order was conclusive even as to the liability of each stockholder for the amount assessed against him, the court observed: "But if this be true, it would seem there was little need for the present action. To give the order the force and effect here contended for is to give it the force and effect of a judgment, and there could be no reason why an execution should not issue directly upon the order without the further intervention of the courts."

It was ruled by the Court of Appeals of New York as follows: "An order of the United States district court directing an assessment upon the stockholders of a certain amount per share to meet a deficiency in the assets of a bankrupt corporation to meet its obligations to its creditors was not, in a subsequent action in a State court for the assessment, conclusive upon the existence or non existence of an obligation on the part of the stockholders to pay the assessment." *Southworth v. Morgan*, 205 N. Y. 293 (98 N. E. 491, 51 L. R. A. (N. S.) 56). In the opinion it was said: "It is urged by the respondent, at this point, that the order of the United States district court directing the assessment of the shares of the defendant conclusively determined the validity and the amount of the assessment. It is true that the regularity and validity of the proceeding in that court and its conclusions can not be attacked in [fol. 127] this action; but the existence or non-existence of an obligation on the part of the defendant to pay the assessment was not within the subject-matter of which that court took jurisdiction. To enable the plaintiff to enforce the liability of the delinquent shareholders to the extent only which the deficiency in the corporate assets required, and to effect parity of contribution between them, it was necessary that an account of the assets and debts, of the entire amount of the capital remaining unpaid upon the issued shares, and the part of the face value of his shares

unpaid by each stockholder, should be taken, and the aggregate assessment required equitably rated by the court, and it is upon those issues that its order is beyond attack in this action. *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. ed. 986; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725. In the former case the court, speaking of an analogous order of a court of Illinois, said: 'But the order was not, and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defense which he might have to an action upon that contract.'

We find nothing in *Howard v. Glenn*, 85 Ga. 238, 264 (11 S. E. 610, 21 Am. St. R. 156), contrary to the above holdings. That was a suit against Glenn for his unpaid subscription to capital stock. In the opinion we find this: "In the present case the main issue was, whether the plaintiff in error was a subscriber to the stock of the National Express and Transportation Company. It was affirmatively alleged in the declaration that he was: *and if he was such* [fol. 128] *subscriber* [italics ours], his liability under the facts of the case was clear and unmistakable." So we may concede here, that if the defendants were members of the corporation, they would be liable. But, as in that case so in this, whether they were or not, was a proper inquiry in the present suit.

The oral arguments in the instant case were unusually strong, and the briefs filed in support thereof were excellent. It would unduly prolong this opinion to notice all branches of the argument or to analyze all the authorities cited. All of them have been considered and examined. We may, however, make a brief reference to some of the stronger of them. *Stone v. Old Colony St. Ry. Co.*, 212 Mass. 459 (99 N. E. 218), is relied on. That decision, while holding that the decree of a foreign court in receivership proceedings against an insolvent insurance company within its jurisdiction, levying an assessment on policyholders, is conclusive, in a suit against a policyholder in another State, of the receiver's authority to enforce any contract liability of the defendant for the assessment, and of the amount re-

quired, also holds that it does not preclude a defendant from asserting that it is not liable.

In *Stone v. Penn Yan, K. P. & B. Ry.*, 197 N. Y. 279 (90 N. E. 843), also relied upon, the ruling was: "Where policies issued by a foreign assessment-insurance company stipulated that if the premium charged is insufficient to pay losses the directors might charge a pro rata additional sum to make up the deficiency, insured, though not a party in insolvency proceedings against insurer, was bound by an order of the foreign court directing an assessment so far as the necessity for making the assessment was determined; but the decree was subject to direct attack in a suit by the foreign receiver, and insured could show that it was not liable either by reason of payment or of release or of run-[fol. 129] ning of limitations or of any other legal defense." Here again, it is to be observed, the New York court held that the policyholder was by the decree concluded only on the question as to the necessity for making the assessment. Nor did the ruling in *Longworthy v. Gardner*, 74 Minn. 325 (77 N. W. 207), strongly relied on by the plaintiff, go any farther. The decision in *Supreme Council of the Royal Arcanum v. Green*, 237 U. S. 531 (35 Sup. Ct. 724, 59 L. ed. 1089, L. R. A. 1916A, 771), recognizes the same distinction as to what matters the decree of the foreign court is held to be conclusive.

5. Having determined that these policyholders are not by the New York decree concluded on the question as to whether or not they became members and as such liable to assessment, the next inquiry is this: Was there anything in their contracts with the companies, to wit, the policies themselves, which constituted them members? This involves a proper construction of the contract; that is, what is its legal import? In ascertaining this, the law of what State shall be applied? The policy is that of a company chartered in the State of New York, but a contract of insurance is made, not where the policy was executed, but where it was in fact delivered. *Swing v. Dayton*, 196 N. Y. 503 (89 N. E. 1113); *Mutual Life Insurance Co. v. Hill*, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. ed. 788; *McClement v. Supreme Court I. O. F.*, 88 Misc. 475 (152 N. Y. Supp. 136), and the many other authorities there cited. If the question would ordinarily be referable to the *lex loci contractus*, it is enough to say that as to where the contract was made the



petition is silent, leaving us without chart or compass. For that reason also we are not here concerned with the rule that, as to a contract made in another State that was one of the original thirteen, or carved from the territory of one of them, and sued upon in this State, we will presume the common law to be of force in such other State. Trustees [fol. 130] of *Jesse Parker Williams Hospital v. Nisbet*, 189 Ga. 807; *Alropa Corporation v. Pomerance*, 190 Ga. 1. Nor whether the court of the forum will decline to apply the law of the situs when the application of such law would contravene the established public policy of the forum. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143 (54 Sup. Ct. 634, 78 L. ed. 1468, 92 A. L. R. 928, and cit.; *Ulman & c. Woolen Co. v. Magill*, 155 Ga. 555, 117 S. E. 657), and cit. In such a situation, we find the correct rule stated in *Pritchard v. Norton*, 106 U. S. 124 (4 Sup. Ct. 102, 23 L. ed. 248): "The rule deduced by Mr. Wharton, *Conflict of Laws*, section 401, as best harmonizing the authorities and effecting the most judicious result, and which was cited approvingly by Mr. Justice Hunt in *Scudder v. Bank*, 91 U. S. 406, 411 [23 L. ed. 245], is that 'Obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified, supplies the applicatory law.' This, it will be observed, extends the operation of the *lex fori* beyond the process and remedy, so as to embrace the whole of that residuum which can not be referred to other laws. And this conclusion is obviously just; for whatever can not, from the nature of the case, be referred to any other law, must be determined by the tribunal having jurisdiction of the litigation, according to the law of its own locality." In addition to planting the rule on the basis of necessity, it can safely rest on still another foundation, to wit, it ought to be assumed that if it be true that the contract was made elsewhere, and if the law of such other State be different from that of the forum, and more favorable to plaintiff, [fol. 131] such facts would have been made to appear from the petition.



the by-laws of the company are not to be considered unless they are made a part of the policy." *Lee v. Missouri State Life Insurance Co.* (Mo. App.), 238 S. W. 858. "One purchasing policy of mutual insurance company *held* not by that act alone to have become a stockholder in company, chargeable with notice of mutual features in its charter

\* \* \* Status of stockholder in mutual insurance company can arise only by consent expressed or implied." *New York Life Ins. Co. v. Street* (Tex. Civ. App.), 265 S. W. 397.

There are numerous cases holding that a mutual insurance company may issue policies on a cash premium and to policyholders who do not become members. Typical of these are *Buck v. Ross*, 59 S. D. 492 (240 N. W. 858); *Johnson v. School District*, 128 Oregon, 9 (273 Pac. 386). See *Greenlaw v. Aroostock County Patrons Mutual Fire Ins. Co.*, 117 Me. 514 (105 Atl. 116); *New York Life Ins. Co. v. Street* (Tex. Civ. App.), 265 S. W. 397; *Watts v. Equitable Mutual Life Assn.*, 111 Iowa, 90 (82 N. W. 441); *Lee v. Missouri State Life Ins. Co.* (Mo. App.), *supra*. See particularly *Dwinnell v. Kramer*, 87 Minn. 392 (92 N. W. 227), where it was held that the policyholder in such company is liable to assessment—"For losses not simply in accordance with his contract. Any such company may fix the contingent mutual liability of its policyholder not merely by its by-laws, but by its policies and the 'total amount of the liability of the policyholder shall be plainly and legibly stated in the face of each policy.' \* \* \* We accordingly hold that the defendants are not liable upon this policy, contingently or otherwise, in any amount in excess of the cash premium therein named." Many other authorities might be cited, and the decision extended, but it does not seem necessary. In a recent case, brought by the same plaintiff in the district court of the United States for the middle district of Georgia, a similar issue was involved, and the decision therein is in harmony with the views herein expressed. *Pink v. Georgia Stages Inc.*, 35 Fed. Supp. 437. Our conclusion is that the defendants by merely accepting these policies did not thereby become members so as to subject them to assessment.

The notation on the back of the policy referred to in the preceding statement of facts was not a part of the policy, and therefore not a part of the contract. On the contrary, the policy specifically negatives this. 14 R. C. L. 934. The

terms of the policy not only fail to put the defendant on notice that he was accepting a policy in a company which was subject to assessments under the laws of the State of New York, but fail in any wise to suggest that the company issuing the policy was an assessment company at all. The only provisions in the policy which throw any light upon the nature and character of the company are such as would merely indicate that it was mutual in character, and that the policyholders would be entitled to participate in the profits and surplus which might be derived from the operation of the company.

6. Since no other contract appears to which the defendants were parties, it follows that the suit was properly dismissed on general demurrer.

Judgment affirmed. All the Justices concur.

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[fol. 133] IN SUPREME COURT OF GEORGIA

L. H. PINK, Superintendent of Insurance of New York,

v.

A. A. A. HIGHWAY EXPRESS, INC., et al.

JUDGMENT—January 16, 1941

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

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[fol. 134] IN SUPREME COURT OF GEORGIA

[Title omitted]

MOTION FOR REHEARING ON BEHALF OF LOUIS H. PINK, SUPERINTENDENT, PLAINTIFF-IN-ERROR—Filed January 27, 1941

Now comes Louis H. Pink, Superintendent of Insurance of the State of New York, plaintiff-in-error, and during the

term which the judgment sought to be reviewed was rendered, and before the remittitur in the case has been forwarded to the Clerk of the Trial Court, files this his motion for rehearing and a vacation of the judgment of affirmance entered in this case.

## 1

Plaintiff-in-error will show that this Court has overlooked material facts in the record, the statutes of Georgia and of New York, decisions of the Supreme Court of Georgia and of the United States Supreme Court, which are controlling authorities and would have required a different judgment from that rendered.

## 2

The material and controlling fact overlooked by the Court is that the insolvent corporation, Auto Mutual Indemnity Company, was a party to the New York litigation. The [fol. 135] Court's statement (page 10 of the opinion) "the corporation was not a party" is erroneous. In the original petition (paragraphs 3 and 4, R. p. 1), appears an allegation that the Company was placed in liquidation on the ground of insolvency by order duly entered, and in the record (page 33, Exhibit "C" to the petition) is a judgment finding that the Court acquired jurisdiction of the Company through consent of the Board of Directors in accordance with Section 401 of the Insurance Law of New York.

It, therefore, affirmatively appears not only that the Company was before the Court when the order was entered, but that the very question of service was passed on by the domiciliary court having jurisdiction.

It is clear that the opinion of this Court, considered en banc, contained a finding that the corporation was not a party. We most respectfully insist that had the opinion shown the contrary, this Court would not have reached the conclusion announced. Indeed, we insist that had the learned Judge, who prepared the opinion, treated this case as one in which the Company was before the domiciliary court in insolvency proceedings, he would have reached a different conclusion. We say this because in the case chiefly relied on by this Court, *Southworth v. Morgan*, 205

N. Y. 293, 98 N. E. 491, the assessment was by a bankruptcy court in New York and not the court of the domicile (New Jersey). That opinion recognizes the distinction between a judgment that might have been made in New Jersey where the corporation was present at its domicile, and one made [fol. 136] in New York where the company was present only because Federal bankruptcy proceedings were pending.

The foregoing error being plain, material and substantial, we respectfully request a consideration of the case by this Court upon the facts as they exist and not as erroneously assumed.

## 3

This court overlooked the fact that plaintiff-in-error sought to recover other indebtedness, "premiums", as well as "assessments". The general demurrer does not question the liability of various defendants for the other indebtedness. The trial court adjudicated the right to bring this action as one in equity, and there is as much reason for maintaining an equitable suit against a group of persons owing premiums as one against a group owing premiums and assessments. We believe this point was discussed in oral argument, but apparently it is not noticed in the briefs.

The indebtedness may be recovered on the prayer for general relief. *Globe & Rutgers v. Salvation Army*, 177 Ga. 890 at 898. And when the plaintiff is entitled to some recovery, a general demurrer may not be sustained.

## 4

This Court recognizes the general rule that a decree of a domiciliary court is binding upon stockholders, resident and non-resident, whether present or not, and that the same principle has been applied to mutual assessment insurance companies, but holds that "it is not necessary to decide whether the principle contended for is sound." If this is [fol. 137] premised upon the absence of the corporation, then the conclusion is sound. But if the corporation was present, then not only is a decision of the principle necessary, but a decision holding the policyholders liable follows as a matter of logic, law and morality. (See the authorities collected in *Broderick v. Stephano*, 171 A. 582, our brief p. 11-12.)

Plaintiff-in-error seasonably asserted and relied on a judgment of the domiciliary court that jurisdiction had been acquired. This Court does not determine the effect of this judgment, but the effect of its decision is to deny to it any force whatever.

This Court examines *Howard v. Glenn*, 85 Ga. 238, and holds that it is not conclusive on the question. It must have overlooked, because it certainly ignores what is held in the 3d head note:

“The corporation having been sued at the instance of creditors and duly served, the defendant in the present action was bound as a corporator by any proceedings in that case, although a citizen of another State, never served with process, did not appear, and had no notice until the institution of the present suit. \* \* \*.”

## 5

The Court overlooked the fundamental principles of mutual insurance in holding that the status of policyholders in a mutual insurance company could be decided by an interpretation of the company's agreement to insure, construed by the laws of the state in which the policy was issued. Cases cited by the Court as typical holdings that policyholders of a mutual insurance company may not be members (Opinion, p. 17) actually hold that every policyholder in a mutual insurance company is, by virtue of that fact, a [fol. 138] member of the company. *Buck v. Ross*, 240 N. W. 858; *Greenlow v. Aroostock County Patrons' Mutual Fire Ins. Co.*, 105 Atl. 116. In both cases it is recognized that the liability of the company to the insured is entirely separate from the liability of the policyholder to the other policyholders and creditors as an insurer. To determine the extent of the second liability, resort must be had to the statutes of the state of incorporation, the charter and the by-laws of the Company. *Buck v. Ross*, *supra* 240 N. W. at page 860. Regardless of liability to assessment under the provisions of the charter and by-laws, all the cases hold that membership is a fundamental attribute to mutuality.

Short excerpts from the foregoing cases demonstrate the truth of our assertion. In the case of *Buck v. Ross*, the Court held:

“By these articles of association and the by-laws each policy holder becomes a member of the corporation, and

to that extent acts as both insurer and insured. \* \* \* Each policyholder is entitled to his voice in the meetings of the company and to share in the profits as determined by the board of directors, whom he may have a voice in electing. These facts determine that this is a mutual company. *Rosebraugh v. Tigard*, 120 Or. 411, 252 P. 75; 32 C. J. 1018. The respondent contends that because this policy was not subject to assessment but provides for the payment of a cash premium, that the company loses its identity as a mutual company. This fact, however, is not contrary to mutual insurance. *Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 661; *Given v. Rettew*, 162 Pa. 638, 29 A. 703."

And in the *Greenlow* case, the Court said:

"The statutes of the state relating to such corporations, the by-laws of the company, the contract, define the rights and *liabilities* of the member as a member. \* \* \*"

Having overlooked the fact that the liability of the member to the company must be determined by the fundamental [fol. 139] law of the company—its charter, and the laws of the state of its domicile—the Court found no reference to the law of the state where the contract was made in plaintiff's petition, and concluded that, absent such allegations, the law of this state would be applied. The cases and principles cited are undoubtedly sound, but can have no application to a case of this nature, where, as has been held by the Supreme Court of the United States, the liability of all the policyholders is the same, and is determined by the law of the company's domicile, regardless of where the member joined. *Modern Woodmen v. Mixer*, 267 U. S. 544 (Our brief page 17), holds:

"\* \* \* the act of becoming a member \* \* \* is something more than a contract; it is entering into a complex and abiding relation \* \* \*, *membership* looks to and must be governed by the law of the state granting the incorporation."

We do not understand the Court's reference to fraternal orders having a ritualistic system. If the Court intended to confine this rule to such fraternal orders only, then it erroneously limits a rule announced generally by the Supreme



Court of the United States. An examination of the cases cited in the Green case and the Mixer case indicates that the leading cases supporting this principle are not fraternal cases. In the Green case the court points out that the principle originated in a decision by Chief Justice Marshall in *Head v. Providence Ins. Co.*, 2 Cranch 127, 167, 2 L. ed. 229, 242. The corporation "is a mere creature of the act to which it owes its existence \* \* \*; it may correctly be said to be precisely what the incorporating act had made it, to derive all its powers from that act, and to be capable of exerting its faculties *only in the manner which the act authorizes*. To this source of its being we must recur to ascertain its powers."

[fol.140] The mandate of the United States Supreme Court is "must". There is no choice for selection by this Court. It is equally bound to refer to the "source of its being" and that source is the charter and statutes of New York, fully set out in the pleadings. When this Court chose the Georgia law it overlooked the foregoing.

## 6

In holding that the laws of Georgia do not make a policyholder in a mutual company liable to assessment even though its charter and by-laws provide to the contrary, the Court has overlooked controlling statutes and decisions of this State. The Court cited a number of out of state cases, none of which are in point, but overlooked Code Sections 56-1401 and 56-1403, which provide:

"56-1401. Contract of mutual insurance, nature of.

The contract of insurance is sometimes upon the idea of mutuality, by which each of the insured becomes one of the insurers, \* \* \* without a charter, such an organization would be governed by the general law of partnership; when incorporated, they are subject to the terms of their *charters*."

"56-1403 By-laws become part of policy.

The rules and regulations of a mutual company, adopted in pursuance of the charter, become a part of each policy, and all the insured are presumed to have notice thereof.  
\* \* \*

This Court also overlooked the full bench decision in *Alma Gin & Milling Co. v. Peeples*, 145 Ga. 722, holding



that the omission of the by-laws of the company from the policy does not affect the right of the company to recover assessments in accordance with their provisions.

The Court overlooked the leading case in the United States on the law of mutual insurance. *Carlton v. South-[fol. 141] ern Mutual*, 72 Ga. 371, which discusses in detail the controlling principles which govern this case.

The Court will doubtless be interested in two decisions, which, though not cited in our brief, construe the above code sections.

*Hartford Steam Boiler Co. v. Harrison*, 183 Ga. 1, s. e. 301 U. S. 459.

In the four opinions written in the *Hartford Steam Boiler* case, no judge questioned the basic premise stated by Mr. Justice Roberts that "the policyholders are the owners of the company and constitute its membership". Nor is the "general law" upon which the court bases its conclusions in accord with this Court's holding in the fifth headnote of its opinion.

As was concisely stated by the Wisconsin Supreme Court in *Huber v. Martin*, 115 Am. St. Rep. at page 1034,

"Proceeding logically, the next question to be taken up is this: Who were the members of the Germantown Farmers' Mutual Insurance Company at the time of the attempted reorganization? The law of its creation answers that most distinctly, if effect is to be given to the plain letter thereof. \* \* \* with language so plain it seems useless to spend time endeavoring by construction to read some idea out of it not found in its letter. \* \* \* The act is in harmony with elementary principles. If it were not for the emphatic declaration the result would be the same in the absence of some provision of the charter to the contrary. It is thus laid down by text-writers, based on authority: 'Membership dates in each case from the time when the insurance is effected'. \* \* \* Am. & Eng. Ency of Law, 2d Ed. 264-266."

And since that decision was announced in 1907, every text-book and every court has been in agreement with the foregoing principle.

[fol. 142]

7

The major premise upon which the Court rests its decision is a person cannot be made a member or stockholder

of a corporation without his consent. 18 C. J. S. Sec. 478, Note 42.

As horn-book law, the rule is correct. When applied to a state of facts not compassed by this rule, it ceases to be an applicable rule of law. It becomes a will-of-the-wisp which can and did lead this Court away from a decision of the questions involved and the legal principles that control it.

That we are correct in the above will appear from an examination of any of the authorities cited in the note referred to.

In the first place, the rule announced a literary aphorism, not an accurate statement of law, and like many phrases attractive to the eye or ear, it is a half truth. The rule is more accurately stated by this Court in *DeLoach v. Bennett*, 156 Ga. 633.

"To constitute one a stockholder, some sort of subscription or contract is required, whereby the subscriber obtains the right, upon some condition, to demand stock and to exercise the rights of a stockholder. But it is not essential that a certificate should have issued, in order to create the relation of stockholder, provided a contract to take stock has been duly made, or *provided the rights, privileges and emoluments of a stockholder have been enjoyed, with the consent of the corporation*. A certificate of stock is authentic evidence of the title to stock, but it is not the stock itself, nor is it necessary to the existence of the stock."

When the legal rule of law is applied to the facts in this record, the membership of these policyholders in the company cannot be questioned. Courts judicially know facts of general acceptance. Neither allegation nor proof is necessary to inform the Court that insurance in mutual [fol. 143] companies is accepted because it is cheaper than stock companies. The very nature of the relationship leads to profits on some occasions and the possibility of loss by assessment on others. The Court is clearly in error in assuming that the burden is on the plaintiff-in-error to prove more than a voluntary relationship between the policyholder and the company. The policy informed him that it was a mutual company and that he might share in the profits. The law informed him that he might be liable for the losses.

In another division of this motion, we have demonstrated the error of this Court in assuming that policyholders do

not enter the relationship of members in a mutual company by reason of the acceptance of a policy providing for a single cash premium, the absence of assessable provisions in their policy or the fact that they joined the Company in a state other than its domicile.

Status once established remains for many purposes and whether it existed cannot be determined by reasoning from event to cause. Logic and law demand reasoning from cause to event. If a court should deny the petition of a married woman for alimony because of her misconduct, would this adjudication of misconduct determine that she did not occupy the status of a widow for the purpose of measuring her rights of inheritance? Certainly not. If she was a wife in life, she is the widow when death ensues. One who accepted a policy in a mutual company is a member though insolvency has set in and instead of expected fruit of dividend, he is faced with the burden of assessment.

Great Western Telegraph Co. v. Purdy, 162 U. S. 329, cited by the Court as authority for the rulings above discussed, holds exactly the contrary. Indeed, the appeal was [fol. 144] allowed by the Supreme Court of the United States because the Iowa court erroneously followed the line of reasoning adopted by this court. As that great Court poses the question, "The question, therefore, is of the effect, as against Purdy, of the order for an assessment made by the Illinois court in a proceeding to which the corporation was a party, but to which he personally was not."

Can there be a more accurate statement of the facts in this record? The Court must agree that the cases are identical. So considering the matter, we are at a loss to understand how the Court cited the Purdy case as an authority in support of its decision when in the very face of its decision, it holds the very opposite. The Supreme Court of the United States in the Purdy case, said:

"The order of assessment \* \* \* unless directly attacked and set aside by appropriate judicial proceeding, is conclusive evidence of the necessity for making such an assessment and to that extent bound every stockholder without personal notice to him."

Had the Supreme Court of Georgia decided the instant case by differing with us on debatable rules of law, this motion would never have been filed, but when the Court cites as its authority a decision of the United States Su-

preme Court which holds exactly the opposite of the contentions advanced, we feel that justice to our client and to the Court demands that we put our finger on the spot and present it to the court for its further consideration.

New York Life Ins. Co. v. Street, 265 S. W. 397, and Lee v. Missouri State Life Ins. Co., 238 S. W. 858, cited by the Court in support of the rule, not only fail to support it but [fol. 145] they are not applicable.

In the Street case the court was passing on the liability of the insurer to the policyholder, the first phase of the contract, and not the second phase which is here involved. This court overlooked the fact that this is a decision by an intermediate court, holding that an insurance company, whose name and policy contained no hint of mutuality, cannot, in equity, obtain a reformation of the contract under the facts there existing. Language torn from its context may support the proposition announced by the Court, but the decision as a whole certainly does not do so.

The Lee case not only is inapplicable, but it has been specifically reversed by name. See Lee v. Missouri State Life Ins. Co., 261 S. W. page 83. Indeed, the opinion cited by this Court as authority contains internal evidence that it would be certified and had the court followed this reference, the reversal would have been apparent.

## 8

Pink, Superintendent v. Georgia Stages, Inc., 35 Fed. Supp. 437, is not a parallel case.

There the Court considered as material, proof that the company had \$100,000.00 capital and therefore came within the exceptional status defined by Georgia law. While we believe this was error, yet this exception removes the case as an authority. There is no such proof in the present record.

[fol. 146] When the Georgia Stages case was tried, a binding authority in New York holding that mutual casualty companies there chartered were limited to the issuance of assessable policies was not available. That Court so bottoms its decision. In this case we have cited the controlling authority, Factory Mutual Liability Ins. Co. v. Behan, 253 N. Y. S. 562. A motion for new trial is pending in the Georgia Stages case and if it is not granted, an appeal will be taken.

## Conclusion

Plaintiff-in-error earnestly submits his plea for a rehearing on the grounds heretofore stated. In doing so he has no selfish personal interest to serve. As an official of the state of the domicile, the right and duty of collecting assessments is placed upon him and if he fails to discharge this duty, many persons will suffer.

That many of the defendants in error are public carriers will appear from their name and the amount of their premiums. Many members of the public have claims which the defendants-in-error insured against. Whether the defendants-in-error have paid these claims and will seek reimbursement from the New York fund, or whether the members of the public will make claim against the fund is immaterial. The assessment is for the benefit of creditors.

" \* \* \* an assessment which was one thing in one state and another in another, and a fund which was distributed by one rule in one state and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum would be distributed."

Supreme Council Royal Arcanum v. Green, L. R. A. 1916(A) p. 777.

[fol. 147] It appears from the discussion in the case of *Pink v. Georgia Stages*, 35 Federal Supp. 437, *supra*, and in the report of the New York proceedings, 14 N. Y. Supp. (2) 601, that policyholders reside in many states. The case in this court is the first to reach an appellate tribunal and its effect will be far reaching.

We realize quite well that if this court has decided the case correctly, then it ought to be followed by other courts and the disappointment of creditors is not chargeable to this plaintiff-in-error. But when a comparison of the grounds which actuated the Court's conclusion discloses them to be identical with the grounds advanced by the Court of Appeals of New York in *Supreme Council Royal Arcanum v. Green*, *supra*, and by the Supreme Court of Missouri in *Bolin v. Sovereign Camp*, W. O. W., 112 S. W. (2) 582, we must conclude that this Court did not fully consider the reversal of the cases discussed by the Supreme Court of the United States. Both of these courts premised their judgment on the fact that "the contract and all its essentials between the parties was entered into, made and

completed in the State of New York (Missouri), and that the charter and statutes of the home state were not material".

In the face of such clear repudiation of these principles by the United States Supreme Court, the plaintiff-in-error asserts that they should be discarded by the State court to whom he appeals for relief.

If the Court should deem the case artificially stated in a matter that can be cured by an amendment to the pleadings, then the judgment sustaining the general demurrer [fol. 148] should be reversed and the case returned with direction; this Court should not deprive creditors of the opportunity to recover the fund which plaintiff-in-error seeks in their behalf. They have not had their day in Court when their claims for relief have not been considered.

Respectfully submitted, Elliott Goldstein, Powell, Goldstein, Frazer & Murphy, Attorneys for Plaintiff-in-error. Powell, Goldstein, Frazer & Murphy, Elliott Goldstein, 1130 C & S Bank Bldg., Atlanta, Georgia.

[Fol. endorsement omitted.]

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[fol. 149] IN SUPREME COURT OF GEORGIA

L. H. PINK, Superintendent of Insurance of New York,

v.

A. A. A. HIGHWAY EXPRESS, INC., et al.

ORDER DENYING MOTION FOR REHEARING—February 14, 1941

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

. . . . .

[fol. 150] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 151] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 26, 1941

The petition for a writ of certiorari to the Supreme Court of the State of Georgia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4855)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 932 48

LOUIS H. FINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,

vs.

*Petitioner,*

v. A. A. HIGHWAY EXPRESS, INC.; H. A. ADAMS, TRADING AS ADAMS TRANSFER CO.; H. L. BASS, AS BASS BUS LINE; SERVICE COACH LINE, INC.; EAST & WEST MOTOR LINES, ROY R. REAGIN, GEORGIA MOTOR EXPRESS, INC., S. S. SALE, SALE TRANSFER CO., SOUTH EASTERN STAGES, INC., EVERREADY CAB COMPANY, J. H. BOOKER, D. B. A. SAVANNAH BEACH LINE AND OR ATLANTIC STAGES; FLUTCHER T. KAYLOR, D. B. A. KAYLOR TRANSFER CO.; J. F. MURRAY, D. B. A. GEORGIA ALABAMA COACH LINE; KALER PRODUCE COMPANY, COX BROS. UNDERTAKING CO., INC., ATLANTA MACON MOTOR EXPRESS, INC., SOUTHEASTERN MOTOR LINES, INC., AND OR CEDARDAWN BUS LINE, J. RUSSELL, D. B. A. RUSSELL TRANSFER CO., CONTINENTAL CARRIERS, INC., BATEMAN COMPANY, INC., DOWDIE BROTHERS CIRCUS, KINNETT ODOM COMPANY, INC., SOUTHERN STAGES, INC., WEATHERS BROS. TRANSFER CO., INC., M. & A. MOTOR FREIGHT LINES, INC.

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF GEORGIA  
AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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No. 932

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LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW  
YORK,

*Petitioner,*

*vs.*

A. A. A. HIGHWAY EXPRESS, INC.; H. A. ADAMS, TRADING AS ADAMS  
TRANSFER Co.; H. L. BASS, AS BASS BUS LINE; SERVICE COACH LINE,  
INC.; EAST & WEST MOTOR LINES, ROY R. REAGIN, GEORGIA  
MOTOR EXPRESS, INC., S. S. SALE, SALE TRANSFER CO., SOUTH  
EASTERN STAGES, INC., EVERREADY CAB COMPANY, J. H.  
BOOKER, D/B/A SAVANNAH BEACH LINE AND/OR ATLANTIC STAGES;  
FLETCHER T. KAYLOR, D/B/A KAYLOR TRANSFER Co.; J. F. MURRAY,  
D/E/A GEORGIA ALABAMA COACH LINE; KALER PRODUCE COMPANY,  
COX BROS. UNDERTAKING CO., INC., ATLANTA MACON MOTOR  
EXPRESS, INC., SOUTHEASTERN MOTOR LINES, INC., AND/OR  
CEDARTOWN BUS LINE, J. RUSSELL, D/B/A RUSSELL TRANSFER Co., CON-  
TINENTAL CARRIERS, INC., BATEMAN COMPANY, INC., DOWNIE  
BROTHERS CIRCUS, KINNETT ODOM COMPANY, INC., SOUTHERN  
STAGES, INC., WEATHERS BROS. TRANSFER CO., INC., M. & A.  
MOTOR FREIGHT LINES, INC.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF GEORGIA  
AND BRIEF IN SUPPORT THEREOF.**

---

*To the Honorable Charles Evans Hughes, Chief Justice of  
the United States, and the Associate Justices of the Su-  
preme Court of the United States:*

Your petitioner respectfully shows:

This is a petition for a writ of certiorari to the Supreme  
Court of the State of Georgia, to review a decision of the

Supreme Court of the State of Georgia, dated January 16, 1941 (adhered to on rehearing February 14, 1941), affirming a final judgment of the Superior Court of Fulton County, Georgia, which dismissed, with opinion (R. 80-81), the bill in equity brought by petitioner against the respondents herein.

## I.

### **Summary Statement of Matter Involved.**

Petitioner is the Superintendent of Insurance of the State of New York and statutory successor of insolvent insurance corporations chartered in that State. On the 13th day of October, 1939, he filed a bill in equity in the Superior Court of Fulton County, naming as defendants certain individuals and corporations, alleging them to be members and policy holders of Auto Mutual Indemnity Company.

He alleged that the Company, by its charter, was authorized to issue casualty policies on a mutual plan only; that the applicable statutes of New York contained mandatory provisions confining membership of the corporation to its policyholders; that mutual insurance companies of this character must provide in their charters and by-laws for the levy of an assessment in case of deficiency of assets, and that every member is obligated to pay assessments not exceeding twice the amount of his annual premium, upon receiving notice thereof.

He alleged further that after the Company had been taken over for liquidation under a judgment of the New York Supreme Court, his recommendation for the levy of a 40% assessment against all members and policyholders had been approved by the court; that thereafter he had computed the amounts due by each member, including the Georgia defendants, also other indebtedness due for premiums.

His second report containing a computation of the amount due by each defendant under the assessment and other in-



debtedness due was filed in the case and on November 18, 1938 a Justice of the Supreme Court of New York entered a decree finding that notice had been mailed to the last known address of the members shown on the books of the insurer and newspaper publication had also been made, all as provided for in the statutes of New York dealing with the liquidation of insolvent mutual insurance companies, and approving the correctness of the reports aforesaid (R. 38).

Relevant sections of New York law covering the liquidation of insolvent insurance companies and assessments therein were attached as exhibits to the pleadings (Amendment of July 25, 1940, R. 18-44 inclusive and Amendment of Aug. 14, 1940, R. 44-46). The charter (Article 4) provided that "the members of the corporation shall be the policyholders therein." And in the same pleadings (Amendment of July 25, 1940, R. 22-23) petitioner alleged the law of New York to be:

"It is the law of New York that every person who accepts a policy of insurance in a mutual insurance company thereby becomes a member thereof. \* \* \*

"It is the law of New York that the aforesaid section 346 compels the Company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed in accordance with Section 346 of the New York Insurance Law. \* \* \*

"It is the law of New York that the laws of that state govern the rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that state."

And that "Every person who was a member of a mutual insurance company at any time within the twelve months prior to the date of the commencement of \* \* \* liquida-

tion proceedings \* \* \* is liable to assessment in accordance with Section 346 of the New York Insurance Law."

The New York proceedings are summarized in the report of the Special Master (14 N. Y. Supp. (2) 501). This opinion is annexed to the brief (Exhibit "A").

All policies contain the standard clause entitling persons obtaining judgments against the insured to proceed against the insurance company under the terms of the policy to the same extent as the insured (R. 48A). The names of many defendants indicate their business as public carriers. By the statutes of Georgia and other States in which they did business as well as by the provisions of the Interstate Commerce Act the filing of their policies was a condition to the exercise of their certificates of public convenience. Against these policies the public has a direct right of action.

The mutual nature of the company appears from its name, from the profit sharing provisions in the face of the policy, and on the back of the policy is a specific recitation that "The Insured is hereby notified that by virtue of this Policy he is a member \* \* \* entitled to vote \* \* \* at any and all meetings of said company," and that "The contingent liability of the named Insured under this policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limit provided by the Insurance Law of the State of New York."

Defendants moved generally to dismiss the bill because (a) it appeared that the policies had been delivered in Georgia, and (b) because the policies contained no provisions on their face for assessment nor reference to the by-laws. Although these defenses challenge presently their right to recover assessments and inferentially admitted the liability for premiums the Court sustained the demurrer and dismissed the entire bill (R. 80-81). The Supreme Court of Georgia affirmed with opinion (R. 82-96). Although the right to recover premiums was insisted upon

(R. 98) a rehearing was denied generally without opinion (R. 107).

The Supreme Court of Georgia construed petitioner's allegations that the defendants were policyholders and members as an averment that defendants were members because they were policyholders. Finding that the policies were delivered in Georgia, the Court ruled inapplicable the statutes of New York and the orders and decrees in the liquidation proceedings.

It concluded that the acceptance of the policy did not make a policyholder a member liable to assessment in accordance with the laws of the State of the company's domicile, although a reference to this liability appeared on the back of the policy "there being in the face of the policy no reference to any contingent liability or assessment, or to any law providing for such," and that this was true notwithstanding the charter of the company "provides that members shall be the policyholders, that its by-laws provide that every member shall be liable to assessment, and that the insurance law of the State of the Company's domicile contains a like provision."

It concluded that Georgia residents were not bound by the liquidation proceedings in New York because they had not been personally served but only by mail pursuant to the New York statutes. It deemed the service on the corporation insufficient, and held that the rulings of this Court, that the rights of members of a mutual corporation must be determined by the single law of the domicile of the corporation, were applicable only to fraternal orders having a lodge system and not applicable here, and that only Georgia law would be applied (R. 82).

It considered the contention advanced by petitioner that his rights to collect a fund for the payment of creditors, based upon assessments authorized by the statutes of New York and confirmed by the judgments of its courts, were

protected by the full faith and credit clause of the Federal Constitution (Article 4, Section 1), and denied it (R. 87-90).

Finally, it concluded that the rights of the defendants, under the Fourteenth Amendment of the Constitution of the United States, prevented enforcement of assessment rights based upon the statutes of New York and a charter granted thereunder (R. 89-90).

## II.

### **Reasons Relied On for Allowance of the Writ.**

The questions involved are of general public interest. They arise in the liquidation of an insolvent mutual casualty company, incorporated in New York under a statute and charter which require a contingent liability from all policyholders as a condition to their membership. Actions to recover these assessments have been brought in the States where these policyholders reside. The conflicting decisions permitting recovery in some States while denying recovery in other States under similar policies create an inequality of duty. Members of the public claiming subrogation under the terms of the policies or direct liability arising out of statutes affecting defendants who are public carriers, are also seriously affected by these conflicting views. The orderly collection of assessments and the payment of dividends cannot proceed until the conflict is settled.

1. The amount of premiums sued for indicate the ownership by certain policyholders of fleets of trucks or busses, the names of many defendants indicate their business as that of public carriers. These defendants have filed policies with the Public Service Commissions of the various States in which they do business and with the Motor Carrier Division of the Interstate Commerce Commission. The public has a direct right of action on these policies and a

vested interest in the capital arising from the statutory assessment. Exoneration of Georgia policyholders from liability destroyed this vested right of creditors.

2. The Supreme Court of Georgia held that in a suit brought by the statutory liquidator of an insolvent insurance company for the recovery of assessments against policyholders, recommended by the liquidator and approved by the domiciliary court, the laws of the forum afford the sole test of liability and the statutes, charter and decrees of the domicile must be disregarded. By its decision it nullified the provisions of the charter making assessments mandatory. It held in effect that this corporation could issue non-assessable policies to Georgia residents. The business of mutual insurance is conducted on the theory that its contracts are dependent upon the charter, as construed by the laws of the domiciliary State.

*Supreme Council Royal Arcanum v. Green*, 237 U. S. 531, 59 L. Ed. 1089.

*Modern Woodmen v. Mixer*, 267 U. S. 544, 69 L. Ed. 783.

*Hartford Life Ins. Co. v. Ibs*, 237 U. S. 662, 59 L. Ed. 1165.

*Sovereign Camp Woodmen of the World v. Bolin*, 305 U. S. 65, 83 L. Ed. 45.

*McClement v. Supreme Court I. O. F.*, 119 N. E. at page 101.

The intention to depart from the established rule was deliberate. The Supreme Court of Georgia relied on *McClement v. Supreme Court I. O. F.*, 152 N. Y. Supp. 136, a trial court decision which was reversed. *McClement v. Supreme Court I. O. F.*, 119 N. E. 99. It chose the law of the forum with knowledge that the principles relied on had, by this Court, been rejected in the cases of *Supreme Council Royal Arcanum v. Green*, *supra*, and *Sovereign Camp*

*W. O. W. v. Bolin, supra*, (R. 106). This rule destroys *pro tanto* the rights of all mutual insurance companies to enforce their charter provisions outside the State of their incorporation.

Decisions of this Court dealing with this principle have involved fraternal insurance associations and the Supreme Court of Georgia (R. 83), justified its departure on this ground. Whether these principles are equally applicable to casualty insurance companies is a question which has not been but should be decided by this Court.

3. The Supreme Court of Georgia (R. 90) assumed that the principles of statutory liability by corporate representation announced in *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, had been modified if not reversed by *Great Western Telegraph Company v. Purdy*, 162 U. S. 337, 40 L. Ed. 986. Such a construction was not justified. This Court specifically limited its rulings to the local statute of limitations, properly applied.

4. While exempting residents of Georgia from liability to assessment when sued by the Liquidator of a company chartered in New York, the courts have heretofore afforded relief to their own residents, suing as creditors to recover assessments under similar conditions. (*Alma Gin & Milling Co. v. Peebles*, 145 Ga. 722, 89 S. E. 820). Such discrimination against a resident of New York denied to him the equality due all citizens, to which he was entitled under Article 4, Sec. 2, Paragraph 1 of the Constitution of the United States, and also deprived him of property without due process of law and the equal protection of the law, contrary to the provisions of the Fourteenth Amendment.

5. Absence of service on Georgia policyholders (R. 124) did not justify the exclusion of the statutes of New York and the decrees entered in the domiciliary proceedings.

(*In re Auto Mutual Indemnity Company*, 14 N. Y. Supp. (2) 601, Exhibit "A".) The presence of the corporation and service upon members by mail was sufficient. (*In re Auto Mutual Indemnity Company*, *supra*, at page 610.) The Supreme Court of Georgia in a full bench decision, binding as a precedent, has so held. *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610. The finding of jurisdiction was not subject to collateral attack in the courts of the forum.

6. The judgment under review is in direct conflict with the opinion of the Supreme Court of South Carolina in a case involving identical facts. (*Pink, Supt. v. T. B. Aaron, et al.*, Supreme Court of South Carolina, Case No. 2091, — S. E. —, decided March 3, 1941. Exhibit "B".)

The validity of the assessment has also been recognized by District Courts of Illinois and Kentucky. The question was certified for opinion to the Supreme Court of Maine by a trial court. A recovery of assessments was denied by the District Court of Georgia (*Pink, Supt. v. Georgia Stages, Inc.*, 35 Fed. Supp. 437), and a Circuit Court of Florida.

From a practical standpoint the conflicting decisions destroy the principle well established in this Court that "an assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed". *Koyal Arcanum v. Green*, 237 U. S. 531 at 543, 59 L. Ed. 1089, L. R. A. 1916A, 771.

An authoritative decision from this Court, settling the conflict, is necessary.

The liability placed upon policyholders by statute is a substantive liability to which every policyholder subjected



himself when he accepted a policy from the company, irrespective of the terms of the policy.

*Beha v. Weinstock*, 160 N. E. (Court of Appeals of New York), at pages 17-18;

Compare *Peoples Banking Co. v. Sterling*, 300 U. S. 175 at 181.

The decision under review destroys the statutory liability. It also destroys the purpose of the parties to enter into a contract of mutual insurance that "everywhere it shall have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse State laws shall be avoided."

*Bozeman v. Connecticut General Life Ins. Co.*, 301 U. S. 196 at 206,

citing *Royal Arcanum v. Green*, *supra*.

### III.

#### **Federal Questions on Which Error is Assigned.**

1. The statutes under which the Auto Mutual Indemnity Company was incorporated, its charter and by-laws, were not accorded the full faith and credit to which they were entitled under Article 4, Section 1 of the Constitution of the United States.

2. The judgment dismissing the petition and the opinion of the Supreme Court of Georgia denying all relief to a statutory liquidator of an insolvent mutual insurance company, chartered under the laws of New York, who sues to recover a balance of premiums admittedly due, and assessments levied in accordance with the statutes and charter provisions, is a violation of the rights guaranteed to him under the full faith and credit provision of the Constitution of the United States, Article 4, Section 1, and of the Fourteenth Amendment.

3. Refusal to accord recognition to the orders and decrees of the Supreme Court of New York, entered in the liquidation proceedings, entitled "*In re Auto Mutual Indemnity Company*, 14 N. Y. Supp. (2) 601", which adjudged the necessity for assessment and specifically adjudicated the liability to assessment of policyholders holding policies identical to those of the defendants residing in Georgia, is a denial of the full faith and credit due to the judgments of a sister State, guaranteed by Article 4, Section 1 of the Constitution of the United States aforesaid.

4. The orders and decrees of the domiciliary court approving the assessment, dated February 7, 1938 (R. 8), and the decree overruling exceptions by residents of South Carolina to the assessment on the ground that the policies contained no provision for assessment (being the identical policies involved here), were adjudications of the liability to assessment of policyholders of this class. (*In Re Auto Mutual Indemnity Company*, 14 N. Y. S. (2) 601 at 605, Appearance for Suburban Transit Company of Columbia, South Carolina. Also at page 607 general appearance for Suburban Transit Company, and at page 608 (8) contentions of residents of South Carolina and Ohio.)

The reference (14 N. Y. S. (2) at 605) was to hear and determine.

"The decision of a referee appointed to hear and determine has the same effect as the decision of a justice of this (Supreme) Court."

*Kiernan v. Consolidated Gas and Gasoline Engine Co.*, 201 N. Y. Supp. 78.

Wherefore, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Georgia commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceed-

ings of the said Supreme Court of Georgia had in the case numbered and entitled on its docket No. 13,549, Louis H. Pink, Superintendent of Insurance of the State of New York, Plaintiff-in-Error, vs. A. A. A. Highway Express, Inc., et al., Defendants-in-Error, to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the order and judgment of said Supreme Court of Georgia be reversed by this Court, and for such other and further relief as to this Court may seem proper; and your petitioner will ever pray.

Dated Atlanta, Georgia, March 25th, 1941.

LOUIS H. PINK,  
*Superintendent of Insurance*  
*of the State of New York,*

By MAX F. GOLDSTEIN,

ALFRED C. BENNETT,

ELLIOTT GOLDSTEIN,

*Counsel for Petitioner.*

## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

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### **I.**

#### **Opinion of the Court Below.**

The opinion of the Supreme Court of Georgia is reported in 13 Southeastern Reporter (2nd), p. 337, and is appended to the record (R. 82-96, inclusive).

### **II.**

#### **Jurisdiction.**

1. The date of the order and judgment of the Supreme Court of Georgia, affirming the dismissal of the case by the trial court, is January 16, 1941. The date of the judgment of the Supreme Court of Georgia denying a rehearing is February 14, 1941.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936.

3. The Supreme Court of Georgia passed upon the constitutional questions asserted in the trial court and denied them (R. 89-90).

### **III.**

#### **Statement of the Case.**

This has already been stated in the preceding petition under "Summary Statement of Matter Involved" I (pp. 2 to 6).

## IV.

**Authorities and Argument.****A. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.**

1. The requirement that public carriers file insurance policies for the protection of the public is of recent origin.

*Michigan Public Utilities v. Duke*, 266 U. S. 570, 69 L. Ed. 207;

*Hicklen v. Concy*, 290 U. S. 169-177, 78 L. Ed. 247.

It probably had its origin in the requirement that taxicab operators provide some security for the public. These operators are men of small means and usually resort to mutual insurance.

*Hadfield v. Landin*, 168 Pac. 516, L. R. A. 1918(B) at 912.

In recent years the Interstate Commerce Commission has joined the States in requiring insurance.

*University Overland Express v. Alsop, et al., Public Utilities Commission*, 189 Atl. 458;

Blashfield's Automobile Laws, Vol. 1, page 131.

The validity of this requirement was recently sustained by this Court.

*Merchants Mutual Ins. Co. v. Smart*, 267 U. S. 129, 69 L. Ed. 542.

The names of many of the defendants disclose the nature of their business as public carriers and the amount of their premiums indicates their ownership of fleets of trucks or busses. What effect the decision in this case, relieving policyholders from liability, will have upon the liability of the company to the policyholders and the public is a doubtful question in which many persons have an interest.

The interim report of the liquidator discloses claims of the public arising out of policies filed with public officials aggregating in excess of one million dollars. A large portion of these claims are by residents of Georgia. An estoppel available against the policyholder will not bar the claims of the public if the policyholder has operated in intrastate or interstate commerce and has obtained his certificate by filing this policy against public liability.

“Then there would be a clear case of estoppel in favor of the public represented by the commissioner which would prevent the company from denying the validity of its policy.”

*United States Casualty Co. v. Timmerman*, 180 Atl. 631;

*McLaughlin v. Central Surety & Ins. Corp.*, 166 Atl. 621.

*Bolta Rubber Co. v. Lowell Trucking Corp.*, 25 N. E. 2(2d) 973,

where the court, dealing with the recent requirement of the Interstate Commerce Commission, held:

“The violation by truckers of requirement in policy  
 • • • would not preclude shipper from enforcing for its own benefit the obligation of insurer to the extent of \$1000 under indorsement added to policy pursuant to regulations of Interstate Commerce Commission. 45 U. S. C. A. Sec. 315.”

And—

*Floyd v. Consolidated Indemnity Ins. Co.*, 261 N. Y. S. 61, 237 App. Div. 190.

In Georgia, public carriers file policies with the <sup>1</sup>Public Service Commission.

*Great American Indemnity Co. v. Vickers*, 183 Ga. 233 at 234, 188 S. E. 24.

Members of the public have a direct interest “in maintaining sufficient insurance fund to pay losses. By section

109 of the Insurance Law the company was directly liable in case of insolvency of the insured to persons injured in an accident covered by the policy”.

*Beha v. Weinstock, supra*, at page 18.

An unequal distribution of the burdens of assessment and dividends on claims results from the decision complained of. The court has not cited any local policy “whereby an insolvent foreign corporation in the hands of a liquidator with title must submit to the sacrifice of its assets or to their unequal distribution \* \* \*.”

*Clark v. Williard*, 292 U. S. 112 at 129, 78 L. Ed. 1160 at 1170.

In the absence of such a policy or controlling statute, the residents of Georgia should submit to assessment.

2. The Supreme Court of Georgia held (R. 93) “A contract of insurance is made, not where the policy was executed, but where it was in fact delivered. \* \* \* as to where the contract was made the petition is silent.”

The physical facts in the record are to the contrary. A typical policy exhibited shows execution by the principal officers in New York City with the corporate seal attached (R. 48A). The place where the contract was made is therefore certain. Its delivery in Georgia is a matter of conjecture, on which the record is silent.

The question raised upon demurrer for decision by the Georgia trial court was the legal effect of a contract of mutual casualty insurance, executed in New York, where the record is silent as to the place of delivery. The decision of the Georgia Supreme Court is not conclusive.

“Whether the question be regarded as one of fact or more precisely and accurately as a question of law to be determined as are other questions of law, \* \* \* it is one arising under the Constitution and a statute



of the United States which commands that such faith and credit shall be given by every court to the California proceedings 'as they have by law or usage' of that state. And since the existence of the federal right turns on the meaning and effect of the California (New York) statute, the decision of the Texas (Georgia) court on that point, whether of law or of fact, is reviewable here."

*Adam v. Saenger*, 303 U. S. 59 at 64, 82 L. Ed. 649 at 652.

"It does not matter that a member joined in another state."

*Modern Woodmen v. Mixer*, *supra*, 267 U. S. 544 at 551.

The place of the contract was the domicile of the company.

The Supreme Court of Georgia relied upon the principles announced in *McClement v. Supreme Court, I. O. F.*, *supra*, 88 Misc. 475, 152 N. Y. S. 136 (R. 93). It overlooked the fact that the case was reversed by the Appellate Division and the reversal affirmed by the Court of Appeals of New York.

*McClement v. Supreme Court I. O. F.*, *supra*, 119 N. E. 99.

The Supreme Court of Georgia also overlooked the fact that the liability of the company to the insured "is entirely separate from the liability of the policyholder to the other policyholders and creditors as an insurer." (Motion for rehearing, R. 99-100).

The Court declined to follow the principles in *Royal Arcanum v. Green*, *supra*, and subsequent cases citing the same principles, on the ground that they were rendered in cases involving fraternal orders with a ritualistic form of government (R. 83), and hence inapplicable to the case at bar. The error in so limiting the rule is obvious. It has been applied generally to stockholders and corporations of various

classes, and even to the rights of persons holding stock in a foreign corporation.

*Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221 at 232, 47 L. Ed. 782 at 787.

The cases are collected in *In Re Auto Mutual Indemnity Company*, *supra*, at page 607-608 (Exhibit "A"). Many other cases could be added, including *Marin v. Augedahl*, 247 U. S. 142, 62 L. Ed. 1038, involving stockholders in a baking company.

The rule has been recognized in Georgia.

*Howard v. Glenn*, *supra*, 85 Ga. 238, 11 S. E. 610.

In *Swing v. Taylor & Crate* (W. Va.) 70 S. E. 373, the Court said:

"By the law of Ohio in force when these policies were issued, a policyholder in a mutual company was made a member of such company, and was liable for losses and necessary expenses accruing to the company during the period of his insurance, 'in proportion to the original amount of his deposit note, or *contingent liability*.' The law of Ohio would, therefore, seem to make both classes of policyholders members of the company during the continuance of their policies. At any rate, the Court of Ohio has so construed the law of that state, and its construction must be accepted by this court. \* \* \*"

"The existence and extent of the liability of a shareholder for assessments or to contribute to the corporation for the payment of debts of the corporation is determined by the law of the state of incorporation. Restatement, Conflict of Laws, Sec. 203."

*Broderick v. Stephano*, 314 Pa. 408, 171 Atl. 582.

Nor may the departure from the general rule above announced be justified on the theory that only the remedy is being passed on. In a recent case (*John Hancock Mutual Life Ins. Co. v. Yates*, 185 Ga. 213, 185 S. E. 268), the Georgia Supreme Court, in passing on a defense arising

from a New York contract, deemed the solution of the question one of remedy and excluded consideration of the *lex loci contractus*. This Court reversed the judgment (299 U. S. 178 at p. 182, 81 L. Ed. 106) holding:

“No question of remedy is presented. The Company sets up as a defense a substantive right conferred by a statute of New York. \* \* \* The declaration by the statute as construed and applied by the highest court of New York \* \* \* determines the substantive rights of the parties as fully as if a provision to that effect had been embodied in writing in the policy.”

The right asserted by petitioner is of the same class.

3. The Supreme Court of Georgia justified its denial of any force and effect to the decrees in the New York proceedings upon the authority of *Great Western Telegraph Company v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, (R-92). The error in so doing has been previously discussed (Petition for Certiorari, paragraph 3), and will not be repeated.

4. The Supreme Court of Georgia held the assessment unenforceable in Georgia because the by-laws were not made a part of the policy directly or by reference (R. 94-96), and (R. 95-96) that the terms of the policy did not put the insured on notice that he was accepting a policy which was subject to assessment under the laws of New York, though knowledge is admitted that the Company was “mutual in character, and that the policyholders would be entitled to participate in the profits and surplus.”

But the mutual nature of the Company was sufficient to put defendants on notice that they would be bound by the constitution and by-laws of the association. This is the law of Georgia (R. 101), and it is recognized by this Court as a matter of common knowledge.

“The policyholders are the owners of the Company and constitute its membership.”

*Hartford Steam Boiler Co. v. Harrison*, 301 U. S. 459 at 464, 81 L. Ed. 1223 at 1227.

And it is the general law. *Huber v. Martin*, 115 Am. St. Rep. at page 1034 (R-102).

Indeed it has been the established law in Georgia for more than fifty years. *Carlton v. Southern Mutual Life Ins. Co.* (1884), 72 Ga. 371 at 372.

“A mutual insurance company is based upon the idea that each of the assured becomes one of the insurers, thereby becoming interested in the profits and liable for the losses. \* \* \* and in a mutual insurance company the idea of mutuality involves the result that each assured becomes interested in profits *and liable for losses.*” (Emphasis ours).

*Carlton v. Southern Mutual, supra*, at page 372.

In *Alma Gin and Milling Company v. Peebles*, 145 Ga. 722, 89 S. E. 820, policyholders in a mutual fire insurance company resisted liability to assessment because the policies contained no reference to the constitution and by-laws. (Such requirement, imposed on fire insurance companies by statute, is not applicable to casualty companies). The Court, while recognizing the relevancy of this statute in an action to establish the liability of the company to the insured, deemed its absence not a defense in an action brought “to establish the liability of policyholders to pay assessments, and to compel them to contribute to the payment of losses sustained by another policyholder.”

The discrimination against petitioner as a resident of New York is clear.

5. Decrees entered in the New York proceedings were binding upon policyholders resident in Georgia who received notice by mail. The New York Insurance Law, Chapter 28, Sec. 422 (4) provides that “The Superintendent shall cause a notice of such order (assessment) \* \* \* to be enclosed in a sealed envelope, addressed and mailed, postage prepaid, to each of said members at his last known address as the same appears on the books of the insurer.”

(R. 29). Such notice was mailed to all of the members, including the defendants in the Georgia proceedings. (Original petition, paragraph 10, R. 9). In cases where the corporation is already a party, such service is sufficient.

*Nashua Savings Bank v. Anglo-American Co.* 189 U. S. 221, at 230, 47 L. Ed. 782.

It does not appear that the statutory provisions for notice are insufficient to give actual notice of the proceedings and an opportunity to be heard. The defendants are members of a company domiciled in New York and the statutory service is sufficient.

*Milliken, et al. v. Meyer, et al.* October Term, 1940, Case No. 66, *Advance Sheets United States Law Edition*, Vol. 85, page 269 at 272-273.

6. A conflict in the decisions of the highest courts of Georgia and South Carolina having jurisdiction over the question, can be reconciled only by a decision of this Court and such conflict affords grounds for the grant of the writ.

#### B. THE TITLE OF THE LIQUIDATOR.

The statutes of New York provide:

"The superintendent \* \* \* shall be vested by operation of law with the title to all of the property, contracts and rights of action of such insurer as of the date of the order so directing them to liquidate \* \* \*."

Insurance Laws of New York, Sec. 404(2).

In re *National Surety Company*, 7 Fed. Supp. 959.

"The statutes of New York relative to the liquidation of insolvent insurance companies \* \* \* Insurance Laws, Sec. 400 to 428, inclusive, are intended to and do furnish a comprehensive, economical and efficient method for the winding up of the affairs of domestic insurance companies by the superintendent of insurance of New York for the benefit of all creditors.

\* \* \* Liquidation is effected by an order of the Supreme Court of the State of New York. Sections 403, 404. Upon the entry of such an order the superintendent \* \* \* as liquidator, becomes the statutory successor of the corporation and is vested by operation of law with title to all of its assets, including choses in action. \* \* \*. The superintendent of insurance became in effect a receiver under the supervision of the state court."

*Motlow v. Southern Holding & Securities Corporation*, 95 Fed. (2) 721 at 724.

An assessment made by a statutory liquidator under the supervision of the domiciliary court is entitled to the same force and effect as a judgment.

"If the assessment had been made in a liquidation proceeding conducted by a court, New Jersey would have been obliged to enforce it, although the stockholders sued had not been made parties to the proceedings, and, being nonresidents, could not have been personally served with process. *Converse v. Hamilton*, 224 U. S. 243, 252-260, 59 L. Ed. 749. \* \* \*."

*Broderick v. Rosner*, 294 U. S. 629 at 644, 79 L. Ed. 1100 at 1108.

#### C. PRIVILEGES CLAIMED UNDER THE CONSTITUTION OF THE UNITED STATES WERE CONSIDERED AND DENIED (R. 89-90).

1. Mutual Automobile Liability Insurance Companies, chartered in New York, must issue assessable policies in every State in which they transact business.<sup>1</sup>

*Factory Mutual Liability Ins. Co. v. Behan, Acting Supt. of Insurance*, 253 N. Y. S. 562.

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<sup>1</sup> Mutual casualty companies require specific statutory authorization before they possess the corporate power to exempt their members from contingent liability to assessment. *Cooley's Briefs on Insurance*, Vol. 1, page 68.

"\* \* \* it is a distinguishing feature of a mutual company that one insuring therein becomes a member of the association. \* \* \*"

"The members and stockholders of a mutual insurance company are therefore identically the same. \* \* \* A stockholder of a mutual

The pleadings clearly allege the integration of the New York laws into the policies of the defendants (R. 22, 23, Paragraph 13(a) (b) (c) (d)).

*Code of Georgia of 1933, Section 81-304, provides:*

“A demurrer denies the right to the relief sought, in whole or in part, admitting all properly pleaded allegations in the petition to be true.”

The corporation “may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers.” *Head v. Providence Insurance Co.*, 2 Cranch 126, 167, quoted with approval in *Supreme Council Royal Arcanum v. Green*, 237 U. S. 531, *supra*, at 543.

The construction placed upon the statutes by the courts of New York must prevail.

*Bradford Light Co. v. Clapper*, 286 U. S. 145, 76 L. Ed. 1026, 82 A. L. R. 696.

2. The judgment approving the assessment was held applicable to policies held by non-residents, which contain on their face no provision for assessment.

*In re Auto Mutual Indemnity Company*, 14 N. Y. Supp. (2) at page 607.

The credit and effect given this judgment in the courts of New York determined the effect to which it was entitled in the courts of Georgia.

*Hancock National Bank v. Farnum*, 176 U. S. 640 at 644, 44 L. Ed. 619 at 621.

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insurance company is simply one who has paid into the capital of the company by way of premiums, and who is responsible for its losses to that extent.”

A recent amendment of the New York Insurance Laws (Laws of 1939, Chapter 882, Sec. 58) will permit mutual casualty companies to issue non-assessable policies under certain conditions, but this power will not become effective until 1942.



3. What has been said above equally applies to this question.

4. In the report aforesaid, *In re Auto Mutual Indemnity Company, supra*, at page 609, the court decreed:

“The failure of the policy to contain a clear statement as to the contingent mutual liability of the members has as little effect upon the liability to pay an assessment as would a provision in the policy contrary to the provision of Section 346. Thus if any provision in the by-laws or in the policy violates Section 346 it is void to that extent. *Beha v. Gale*, 129 Misc. 858, 223 N. Y. S. 253.”

This adjudication was binding on the members resident in Georgia.

*Modern Woodmen v. Mixer, supra.*

The fact that the original right of action so decreed could not have been maintained in the courts of Georgia is not an answer.

*Keeney v. Supreme Lodge of World Loyal Order of Moose*, 252 U. S. 411 at 415, 64 L. Ed. 638 at 640.

#### D. ASSENT WAS NOT NECESSARY TO CREATE LIABILITY FOR ASSESSMENT.

The statutory liability that follows is imposed by law as an incident to membership in the corporation, regardless of assent to it and even in spite of agreement to the contrary.

*Broderick v. Rosner*, 294 U. S. 629, 79 L. Ed. 1100, *supra*;

*Converse v. Hamilton*, 224 U. S. 243, 59 L. Ed. 749;

*Whitman v. Oxford National Bank*, 176 U. S. 559, 44 L. Ed. 587;

*Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732;

*Smathers v. Bank*, 155 N. C. 283, 71 S. E. 345.

In the last two cases the estate of a married woman was held liable for assessment though the laws of the domicile made her contract void.

"This liability is not contractual on the part of the stockholder, but is statutory and imposed for the benefit of creditors, and hence a married woman, when she becomes the owner of the stock, assumes the same liability as all other stockholders."

*Smathers v. Bank, supra*, 71 S. E. at 346.

And in the *Christopher* case, *supra*,

"The right to be a stockholder is given her by the law of the state where she resides and her *right and liability* as such are provided by the acts of Congress." (Italics by the court.)

The contingent liability is part of the capital of a mutual insurance corporation.

*Warner v. Delbridge* (Mich.), 34 L. R. A. 701 at 703.

"The contingent fund \* \* \* is a part of the fund upon the credit of which such contracts of insurance are entered into."

"All the policyholders in the defendant (company) knew that they were taking insurance in a mutual company. Liability to assessment for loss is one of the incidents to insurance of that kind."

An agreement releasing this contingent liability would be void.

*Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203.

Creditors have a vested right in this contingent liability.

*Corning v. McCullough*, 1 Comstock 47; 49 Am. Dec. 287 at 290.

A statute or decision which destroys this contingent liability violates the contract clause of the Constitution.

"A clause in the charter of a corporation which pledges to the creditors of the company the liability of

the stockholders to the extent of their stock, is security to the creditors for the payment of the debts of the company which have been contracted upon the faith of this liability."

"In case of the inability or insolvency of the company, the stockholder, by such clause, becomes liable to the creditor for its debts, to the extent of his stock."

"A State Act repealing this individual liability clause of the charter is, as to debts contracted before the repeal, a law impairing the obligation of the contract within the Constitution of the United States, and void."

*Hathorn v. Josiah Calef*, 2 Wall. (69 U. S.) 10, 16 L. Ed. 776.

And it is an impairment of the contract right of all other members and creditors.

*Coombes v. Getz*, 285 U. S. 434 at 448, 76 L. Ed. at 866.

## V.

### Conclusion.

Divergent views of the courts of the several States, in which proceedings to recover assessments are pending, have resulted in "the application of many divergent, variable and conflicting criteria," the destructive effect of which was recognized by this Court in *Supreme Council Royal Arcanum v. Green*, *supra*, 237 U. S. at page 542.

Policyholders of this Company reside in twenty-seven States. The assessments levied against New York residents total \$140,742.23 and assessments levied against policyholders residing outside the State of New York total \$429,200.00.<sup>2</sup> Many of these assessments are for small amounts. To obtain jurisdiction over them in New York is impossible and the cost of the litigation would be prohibitive.

Compare *Broderick v. Rosner*, *supra*, 294 U. S. 639-640.

<sup>2</sup> Sixth Report of Louis H. Pink, Liquidator, filed in the Supreme Court of New York County, Case No. 28894, in the matter of Liquidation of Auto Mutual Indemnity Company, January 19, 1940.

Unless the validity of the assessment in every State in the Union is established by a judgment of this Court requiring recognition of the New York statutes and proceedings, the physical difficulty and the cost of recovering the assessments will render the proceedings futile. All claimants, whether policyholders or members of the public, will be left without remedy.

Petitioner, as a public official, is charged with the duty of liquidating this particular company, and in the discharge of this duty he seeks to recover assessments from all policyholders. As Superintendent of Insurance of the State of New York, he is charged with the duty of examining and supervising the business of all insurance companies chartered by that State.

The mutual insurance companies have no capital other than the contingent liability provided by statute. In 1939 the premiums collected by mutual companies, chartered in New York, approximated fifty million dollars.<sup>3</sup> If the right of assessment conferred by the charter receives general recognition, then the contingent liability is twice this amount, a sum amply sufficient to provide reserves for any emergency. But if this assessment is not enforceable in some of the States in which the company did business, then this must be given consideration in determining the solvency of the company. If there is added to the loss of assessment the burden of claims arising in States where the assessment

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<sup>3</sup> From the 1940 New York Insurance Report the following facts appear: In 1939 casualty companies chartered in New York—Stock—had total admitted assets of \$406,000,000.00 (approximate); Casualty companies—Mutual—total admitted assets of \$107,000,000.00. During this year the Stock Companies received premiums approximating \$171,803,000.00 and the Mutual Companies received premiums approximating \$49,447,000.00. The capital guaranty funds of the Stock Companies totalled \$46,000,000.00 (approximate) and the Mutual Companies had special deposits totalling \$1,150,000.00. The balance of their capital fund is their right to assess their members sums not exceeding twice the annual premium.

is not collected,<sup>4</sup> a complicated and confused result follows.

The business of insurance cannot be properly conducted if "divergent, variable and conflicting criteria" arise in its operation in States other than the domicile.

The writ should be granted and the decision of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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<sup>4</sup> The Supreme Court of Georgia cites *Pink v. Georgia Stages, Inc.*, 35 Fed. Supp. 437 (R. 95) as a true statement of Georgia law. Though the right to collect assessments was denied, the claims of the policyholder against the fund in the hands of the Liquidator were allowed in the sum of \$12,502.38. (Finding of Fact 10½, 35 Fed. Supp. 441). The vice in this decision is in the conclusion of law No. 10 (page 445) that the Company had corporate power to issue a non-assessable policy.

**EXHIBIT "A".**

IN RE AUTO MUT. INDEMNITY CO.

SUPREME COURT, NEW YORK COUNTY.

Sept. 8, 1939.

## 1. Appearance 17.

Nonresident policyholders of an insolvent mutual automobile casualty company, which was in process of liquidation, who filed special appearances objecting to jurisdiction of trial court to enter an order to show cause why superintendent of insurance should not have judgment against them for the amount of an assessment authorized to be levied against such policyholders, did not waive their objections to jurisdiction by simultaneously filing general objections to the merits or cross-claims. Insurance Law, §§ 340 et seq., 400 et seq., 422, subd. 4; § 423.

## 2. Appearance 9(1)

Where a policyholder objecting to an assessment directed to be levied against policyholders of an insolvent mutual automobile casualty company in process of liquidation filed objections on merits to order of trial court ordering policyholders to show cause why superintendent of insurance should not have judgment against them for amount of assessment, a general appearance resulted which was not vitiated by policyholder's subsequently attempted special appearance addressed to jurisdiction of trial court. Insurance Law, §§ 340 et seq., 400 et seq., 422, subd. 4; § 423.

## 3. Insurance 71(2)

The validity of an assessment made in connection with the liquidation of an insolvent insurance corporation, such as a mutual automobile casualty company, is governed by laws of state where corporation has its domicile. Insurance Law, §§ 340 et seq., 400 et seq., 422, subd. 4; § 423.

#### 4. Corporations 31, 592

A corporation is created by edict of Legislature, and dies at its command.

#### 5. Evidence 65

Knowledge is imputed to all who deal with a corporation that when it suspends business the law takes charge of its affairs, liquidates its debts, converts its assets and distributes the proceeds thereof among its creditors.

#### 6. Evidence 65

Those who contract with a corporation do so with knowledge of the statutory conditions pertaining to the corporation, and such conditions must be deemed to have permeated the agreement and constituted elements of the obligations.

#### 7. Corporations 391

A state may impose appropriate requirements for the privilege of doing business under its corporate laws.

#### 8. Insurance 71(1)

Where assessment against policyholders of insolvent mutual automobile casualty company in process of liquidation was levied in accordance with laws of the state in which such corporation was domiciled, the assessment created a valid obligation in res and was binding alike on both resident and nonresident policyholders. Insurance Law, §§ 340 et seq., 400 et seq., 422, subd. 4; § 423.

#### 9. Insurance 138(1)

If a provision in by-laws or policies of a mutual automobile casualty company violated the statute relating to assessments against members of such companies, the provision was void to extent that it violated the statute. Insurance Law, § 346.

#### 10. Insurance 71(1), 193(1)

That policies issued by a mutual automobile casualty company and that the by-laws of the company may have been



silent with respect to assessments against policyholders in case of liquidation of company did not relieve policyholders from liability to pay an assessment directed to be levied in connection with liquidation of the company, but such failure merely prevented company from fixing a higher contingent liability than that specified by statute concerning contingent liability of members of such companies. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

#### 11. Insurance 71(3)

The statute providing that in absence of provision in policies and by-laws of a mutual automobile casualty company, the contingent liability of a member to pay assessments shall not be less than an amount equal to twice the amount of, in addition to, the cash premium provided for in the policy establishes a minimum contingent liability of members which must prevail in any event as to all companies coming within provisions of statute concerning incorporation of such companies. Insurance Law, §§ 340 et seq., 346.

#### 12. Judgment 17(1)

Residents of New York can be bound by a judgment of New York courts without personal service of process, and as to such residents it is no objection to the validity of a proceeding that it does not require personal services of a notice or process upon the party whose property is in question.

#### 13. Constitutional law 309(1)

Where notice of court order requiring policyholders of insolvent mutual automobile casualty company to show cause why superintendent of insurance should not have judgment against them for amount of an assessment was published by superintendent and a copy sent to each policyholder, in accordance with statute concerning levy of assessments against members of such companies, the notice was sufficient to satisfy constitutional requirements of due process with respect to right of superintendent to recover judgments thereon against resident policyholders. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

## 14. Judgment 17(3)

In order to obtain a valid personal judgment against a nonresident, there must be personal service within the jurisdiction.

## 15. Constitutional law 309(1)

A judgment obtained without personal service within the jurisdiction, where a nonresident is affected, constitutes a "taking of property without due process of law."

## 16. Judgment 17(3)

Where nonresident policyholders of insolvent mutual automobile casualty company had not been served with process within the jurisdiction and had not appeared generally in filing objections to jurisdiction of trial court to order them to show cause why an assessment should not be paid, a personal judgment for payment of assessment would not be ordered against such policyholders although they were bound by the finding of necessity for the assessment and amount thereof. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

## 17. Insurance 71(4)

That the notice of a court order requiring policyholders of an insolvent mutual automobile casualty company, which was in process of liquidation, to show cause why they should not be held liable to pay an assessment levied against them, failed to designate parties plaintiff or defendant, or to show, on its face, to whom the notice was addressed, did not render the notice insufficient to comply with statute concerning duty of superintendent of insurance to publish such notices, since proceeding for judgment upon the assessment was a "special proceeding," and not an "action at law." Insurance Law, §§ 340 et seq., 346, 422, subd. 4; § 423.

[Ed. Note.—For other definitions of "Action; Action at Law" and "Special Proceeding," see Words & Phrases.]

## 18. Insurance 71(2, 3)

Objections filed by policyholders of an insolvent mutual automobile casualty company complaining as to amount and time of levying an assessment against them and as to court order directing them to show cause why superintendent of insurance should not have judgment against them for the assessment were without merit where amount of assessment was within limits of contingent liability of such policyholders under policies and statute and method of computing assessment conformed to statutory requirements and superintendent's report as to assets of company was filed within one year as required by statute and conformed thereto. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

## 19. Insurance 71(1, 2)

That policyholders of an insolvent mutual automobile casualty company were not notified of an assessment imposed upon them within one year after the expiration or cancellation of their policies, as provided by statute, and that they were not members of the company at the time liquidation proceedings were instituted against it, did not relieve the policyholders from liability for assessment. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

## 20. Insurance 71(2)

The statutory provision for notice to members of mutual automobile casualty companies with respect to assessments is not applicable to an assessment levied in liquidation proceedings involving such companies, but relates only to assessments made by the company as a going concern. Insurance Law, § 346.

## 21. Insurance 71(1)

The date when liability of policyholders of a mutual automobile casualty company to pay assessments for protection of creditors accrued was the date upon which a liquidation proceeding involving such company was commenced, and

members whose policies had expired or had been canceled within one year prior to date of commencement of liquidation proceedings were to be treated as included among persons liable to assessments. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, subd. 4; § 423.

## 22. Insurance 63

Policyholders of an insolvent mutual automobile casualty company could not offset their personal claims against the company against an assessment imposed in liquidation proceedings involving the company. Insurance Law, §§ 340 et seq., 346, 400 et seq., 420, subd. 2; 422, subd. 4; § 423.

## 23. Insurance 63

The principle of actual set-off, often applied under bankruptcy or other insolvency laws, has no application where the obligation is to pay an assessment.

## 24. Insurance 71(1)

That a mutual automobile casualty company breached its contract with its policyholders when it was placed in liquidation did not relieve such policyholders from liability for assessments, although breach by company gave rise to a provable claim against fund of the company in hands of superintendent of insurance. Insurance Law, §§ 340 et seq., 346, 400 et seq., 422, 423.

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Proceeding in the matter of the liquidation of the Auto Mutual Indemnity Company, wherein there was an application for an order directing judgments upon assessment, and upon other indebtedness, pursuant to the Insurance Law, §§ 422, 423, and the case was referred to a referee to hear and determine the issues raised by objections to the assessment directed by the court to be levied against policyholders of the company.

Order recommended in accordance with opinion.

Irvin Waldman, of New York City, for Louis H. Pink, Superintendent of Insurance.

Mullen & Feller, of New York City (Samuel R. Feller and Leo H. Hirsch, Jr., both of New York City, of counsel), for West Penn Forwarding Co., Inc.

Simpson, Thacher & Bartlett, of New York City (Frederick B. Lee, of New York City, of counsel), for Dixie Coaches, Inc.

Kaufman & Weitzner, of New York City (H. W. Fensterstock and Max Herschaft, both of New York City, of counsel), for Roadway Transit Co.

Benjamin M. Goldstein, of Monticello, for Allen Bros. Inc., et al.

Frank A. Pfalzer, of Buffalo (Vito Cardo, of New York City, of counsel), for New York Car Carriers, Inc.

Michael A. Petroccia, of Glen Cove, L. I., for All States Freight, Inc.

Brown & Gutze, of Columbia, S. C., for Suburban Transit Co. of Columbia, S. C.

Benjamin Gollay, of New York City, for Elmhurst Taxi Corporation.

William C. Hare, of New York City, for B. H. Griggs.

Max Herschaft, of New York City, for Rupp Drug Co. Inc., et al.

Max Herschaft, of New York City, for Mack Beverage Co. et al.

Bose & MacCarthy, of New York City (John C. MacCarthy, of New York City, of counsel), for Clayton H. Exner and Robert H. Carr.

William G. Sheppard, in pro. per.

#### FRANKENTHALER, Referee:

This is a reference to hear and determine the issues raised by objections to an assessment directed by the Court to be levied against the policyholders of an insolvent mutual automobile casualty insurance company in process of liquidation. The levy was made pursuant to the pertinent provisions of the Insurance Law by reason of the insufficiency of assets to pay liabilities. Objections to the levy challenge the validity of the statute authorizing the levy, the applicability thereof to non-residents, the propriety of the procedure followed by the Superintendent and the amount of

the assessment. Rights of set-off for unearned premiums and accrued loss claims are advanced by members and the propriety thereof is contested.

Auto Mutual Indemnity Company, now in liquidation, was incorporated on May 26, 1932, under Article 10-B of the Insurance Law, as a mutual automobile casualty insurance company. It was authorized by the Insurance Department on October 5, 1932, to transact business in the State of New York and thereafter secured authority to do business in a large number of other states. On February 21, 1933, its original name "Auto Cab Mutual Indemnity Company" was changed to "Auto Mutual Indemnity Company."

On November 10, 1937, the Superintendent of Insurance instituted proceedings against the company pursuant to Article XI of the Insurance Law, and the company was placed in liquidation on the ground of insolvency on November 24, 1937, by an order of this Court. The superintendent then proceeded, within one year thereafter, as provided by the Insurance Law, § 422, to make a report setting forth the reasonable value of the assets, the probable liabilities and the probable necessary assessment to pay all allowed claims in full.

Accordingly, on February 7, 1938, the Court by order authorized a levy of 40%. This assessment applied to all members of the company against whom the Board of Directors could levy an assessment at the time when the special proceeding against the company was instituted.

The Superintendent of Insurance computed the amount against each person liable therefor, together with a statement of the liability of the policyholder for other indebtedness in accordance with Section 423 of the Insurance Law, and made a second and supplementary report thereon.

On the basis of this second report an order to show cause was issued on August 12, 1938, directing payment on or before September 19, 1938, of the assessments and other liabilities of the members to the company, and ordering the members whose assessments and other liabilities remained unpaid on that date to show cause why they should not be held liable to pay the same and why the Superintendent should not have judgment accordingly. Notice of such order, with the summary of its contents as required by the

Insurance Law, Section 422, subdivision 4, was published and mailed to each of the members in accordance with the said order. Objections having been filed by various policyholders, hearings were had upon said objections.

Certain preliminary contentions urged by the Superintendent of Insurance are to be considered. Special notices of appearance were filed on behalf of certain policyholders objecting to the jurisdiction of the Court, accompanied by general objections going to the merits of the claim or setting up cross-claims.

[1] It is urged by the Superintendent that an objection based upon the merits accompanying a special appearance challenging the jurisdiction nullifies such special appearance on the theory that service of an answer addressed to the merits of a complaint is inconsistent with a special appearance interposed to contest the jurisdiction. Section 422 of the Insurance Law provides for a method of interposing an answer to the order to show cause, by means of appearance and service of verified objections. A non-resident policyholder objecting to the jurisdiction might rest his entire case upon that ground, yet he should not be deprived of such objection by having simultaneously filed general objections in order to save his substantive rights in the event his main challenge should be overruled. Accordingly, those non-residents who have filed objections to the jurisdiction and simultaneously also filed general objections to the merits or cross-claims, will not be deemed to have waived their objection to the jurisdiction. If the objection to the jurisdiction is sustained in their cases, it will be unnecessary to consider the objections on the merits, which will then be deemed withdrawn.

[2] On the other hand, the rule should not be extended beyond reasonable limits. One of the objectants, Suburban Transit Company, filed objections on the merits, and thereafter sought to supplement them by a special objection addressed to the jurisdiction. Its motion to allow a notation of special appearance based on lack of jurisdiction having been denied, reconsideration is now requested. The original determination will be adhered to. An objection addressed



solely to the merits having been filed, a general appearance results which should not be vitiated by a subsequent special appearance.

[3-6] Constitutional questions have been raised with reference to the validity of the assessment and the propriety of the notice to members. These questions have been presented by resident and non-resident members alike. It is well settled that the validity of an assessment made in connection with the liquidation of an insolvent insurance company is governed by the laws of the state where the corporation has its domicile. *Modern Woodmen of America v. Mixer*, 267 U. S. 544, 551, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384; *Supreme Council of Royal Arcanum v. Green*, 237 U. S. 531, 542, 35 S. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771; *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200; *Broderick v. Rosner*, 294 U. S. 629, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133. As was said in *People v. American Loan & Trust Co.*, *supra*, 172 N. Y. at page 377, 65 N. E. at page 201, "A corporation is created by the edict of the legislature, and dies at its command. Knowledge is imputed to all who deal with it that when it suspends business the law takes charge of its affairs, liquidates its debts, converts its assets, and distributes the proceeds among its creditors. Those who contract with it do so 'with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation.' *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174, 179; *People v. Security Life Ins. & Annuity Co.*, 78 N. Y. [114] 115, 34 Am. Rep. 522."

[7] This rule follows the principle that a state may impose appropriate requirements for the privilege of doing business under its laws. In *Modern Woodmen of America v. Mixer*, 267 U. S. 544, 551, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384, the Court said: "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation."

The rule and the reason therefor are fully stated in *Supreme Council Royal Arcanum v. Green*, 237 U. S. 531, 35

S. Ct. 724, 728, 59 L. Ed. 1089, L. R. A. 1916A, 771, where Mr. Chief Justice White said: " \* \* \* an assessment which was one thing in one state and another in another, and a fund which was distributed by one rule in one state and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which has led courts of last resort of so many states in passing on questions involving the general authority of fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation and the laws of the state under which it was granted as the test and measure to be applied. \* \* \*

In addition it was by the application of the same principle that a line of decisions in this court came to establish: first, that the law of the state by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, that the state law and proceedings are binding as to the ascertaining of the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected; and third, that putting out of view the right of the person against whom a liability for a stockholder's subscription is asserted to show that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which at law or equity he is entitled to set off against the corporation, or has any other defense personal to himself, a decree against the corporation in a suit brought against it under the state law for the purpose of ascertaining its insolvency, compelling its liquidation, collecting sums due by stockholders for subscriptions to stock and paying the debts of the corporation, in so far as it determines these general matters, binds the stockholder, although he be not a party in a personal sense, because by virtue of his subscription to stock there was conferred on the corporation the authority to stand in judgment for the subscriber as to such general questions. *Selig v. Hamilton*, 234 U. S. 652,

34 S. Ct. 926, 58 L. Ed. 1518 [Ann. Cas. 1917A, 104]; *Converse v. Hamilton*, 224 U. S. 243, 32 S. Ct. 415, 56 L. Ed. 749 [Ann. Cas. 1913D, 1292]; *Bernheimer v. Converse*, 206 U. S. 516, 27 S. Ct. 755, 51 L. Ed. 1163; *Whitman v. National Bank*, 176 U. S. 559, 20 S. Ct. 477, 44 L. Ed. 587; *Hawkins v. Glenn*, 131 U. S. 319, 9 S. Ct. 739, 33 L. Ed. 184."

[8] The assessment was duly levied in accordance with the statutes of the State of New York where the corporation had its domicile and it follows that the validity of the assessment as an obligation in res is binding alike upon non-residents and residents. Even if the law were otherwise, the contentions of those residents of South Carolina and Ohio who proved the statutory law of their respective states cannot be sustained because an examination of those statutes shows that the provisions thereof do not bar the enforcement of the provisions of the New York statute. Whether that liability can be converted into a personal judgment against a non-resident policyholder without actual personal service upon him as distinguished from constructive service is a different question.

It is urged by some members that the statute relating to assessment covers only such policies as expressly provided for assessments. The company had issued various forms of policies, some of which bore a reference to the contingent liability prescribed by Section 346 of the Insurance Law, in the body of the policy and others of which referred to it on the reverse side thereof. All of the policies, however, referred to this contingent liability. Where such policies were silent on the subject of assessments or had no clear statement thereon, the obligation for an assessment is claimed by the objectants not to exist. This argument is predicated on the assumption that Article 10-B of the Insurance Law, dealing with mutual automobile casualty insurance corporations, did not contemplate mandatory assessments in such cases.

[9-11] Section 346 provides that the "corporation shall in its by-laws and policies fix the contingent mutual liability of the members \* \* \*; but such contingent liability of a member shall not be less than an amount equal to twice the amount of, and in addition to, the cash premium pro-

vided for in the policy \* \* \*." Objectants contend that unless the assessment plan is mentioned in the by-laws there is no liability to pay it. The argument is not sound. The statute compels the corporation to fix the contingent mutual liability. Even if it has failed to comply with this mandatory provision it could not be said that no assessment is due. Were it held otherwise the statute would be nullified. The failure of the policy to contain a clear statement as to the contingent mutual liability of the members has as little effect upon the liability to pay an assessment as would a provision in the policy contrary to the provision of Section 346. Thus if any provision in the by-laws or in the policy violates Section 346 it is void to that extent. *Beha v. Gale*, 129 Misc. 858, 223 N. Y. S. 253. The statute fixes the contingent liability at not less than the amount therein provided. Failure to fix any other amount in the by-laws and policy merely prevents the company from fixing a higher contingent liability. In that event the minimum specified in the statute becomes also the maximum. The correctness of this position is confirmed by the last sentence of Section 346 which provides that "All assessments \* \* \* shall be for no greater amount than that specified in the policy and by-laws". In the absence of such provision in the policy and by-laws, the provisions of the first sentence of Section 346 that "such contingent liability of a member shall not be less than an amount equal to twice the amount of, and in addition to, the cash premium provided for in the policy" becomes applicable. That minimum must prevail in any event as to all companies coming within the provisions of Article 10-B. Moreover, the statute provides that "every member shall be liable to pay and shall pay his proportionate part of any assessment which may be laid by the corporation in accordance with law and his contract, covering any deficiency \* \* \*."

Though the provisions of that particular section are clear, a study of Article 10-B confirms the interpretation above set forth. This construction is reasonable, within the intent of the statute, and accomplishes the purpose intended to protect policyholders, creditors and the general public.

The right of the Superintendent to recover judgments against policyholders by proceeding in accordance with the

provisions of Section 422 of the Insurance Law is challenged as a violation of the requirement of due process of law.

[12] Residents of this state can be bound by the judgment of its courts without personal service of process. *Continental National Bank v. Thurber*, 74 Hun 632, 634, 26 N. Y. S. 956, affirmed, *Continental Nat. Bank of Boston v. United States Book Co.*, 143 N. Y. 648, 37 N. E. 828; *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199, 215; *Broderick v. Rosner*, 294 U. S. 629, 646, 55 S. Ct. 589, 79 L. Ed. 1100, 100 A. L. R. 1133; *Clement v. May*, 136 App. Div. 199, 120 N. Y. S. 588, 591. As was said in the case last cited: "It is no objection to the validity of the proceeding that it does not require personal services of a notice or process upon the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on or against him and an opportunity is afforded him to defend. *Matter of Empire City Bank*, 18 N. Y. 199; *Rockwell v. Nearing*, 35 N. Y. 302; *Happy v. Mosher*, 48 N. Y. [313], 317; *Hiller v. B. & M. R. R. Co.*, 70 N. Y. 223; *Matter of Union E. R. R. Co. of Brooklyn*, 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359. The Legislature has uniformly acted upon that understanding of the Constitution, and has provided for the services of process or notice upon natural persons by posting, publication, by mail, by leaving the notice at the parties' place of residence, or by leaving it with the person in whose possession the property may be found."

[13] Section 422 of the Insurance Law requires the Superintendent to cause the notice to policyholders to be published and a copy to be enclosed in a sealed envelope, addressed and mailed, postage prepaid, to each member at his last known address. Such notice was published and sent by the Superintendent to each member. It was reasonably calculated to inform the parties of the proceedings and they were afforded an opportunity to be heard in defense before an impartial tribunal. Under those circumstances the notice satisfies the requirements of due process in so far as residents of this state are concerned.

[14, 15] The rule is otherwise as to non-residents. It is well settled that in order to obtain a valid personal judgment against a non-resident there must be personal service within the jurisdiction. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Pope v. Heckscher*, 266 N. Y. 114, 194 N. E. 53, 97 A. L. R. 687. A judgment obtained without personal service within the jurisdiction, where a non-resident is affected, constitutes a taking of property without due process of law. *Riverside & Dan River Cotton Mills, Incorporated, v. Menefee*, 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910; *Matter of McDonald*, 225 App. Div. 403, 406, 233 N. Y. S. 368; *McCarthy v. Culkin*, 254 N. Y. 328, 331, 172 N. E. 524.

In *Pope v. Heckscher*, *supra*, a judgment was recovered in a Canadian Court against a resident of this State for the unpaid balance of a subscription to stock of a Canadian corporation after service of process by mail directed to the defendant at his address in this State. The Court held that had the judgment been one of another State it would not have been entitled to full force and effect and that no greater weight was to be given to a judgment of a foreign country. Accordingly, the action based on the Canadian judgment was dismissed. The Court at page 119 of 266 N. Y., 194 N. E. at page 54, 97 A. L. R. 687, quoted as follows from *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091: "Notice sent outside the State to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery. *Pennoyer v. Neff*, 95 U. S. 714 (24 L. Ed. 565). There must be actual service within the State of notice upon him or upon some one authorized to accept service for him.' "

In *Hood v. Guaranty Trust Company*, 270 N. Y. 17, 200 N. E. 55, 59, involving an assessment against the stockholders of a North Carolina Bank, the Court of Appeals upheld a judgment for the North Carolina Commissioner of Banks, but made the statement that "Nothing in this opinion is to be construed as holding that without personal service within the state personal judgment could be entered against a nonresident stockholder. \* \* \* We merely hold that the stockholders, having implicitly agreed that the corporation represent them, are bound by a finding of the



necessity for an assessment and the amount of the assessment."

[16] These rules of law are equally applicable in the case of policyholders in a mutual insurance company. Accordingly no personal judgment will be ordered against non-resident members or policyholders who have not appeared generally or been served personally with process within the State, although, as hereinabove set forth, they are bound by the finding of the necessity for the assessment and the amount thereof.

[17] Certain alleged defects of form of the notice are asserted, for example, that no parties plaintiff or defendant are designated and that the notice does not show on its face to whom it appears to be addressed. These and other similar objections are without substance. This being a special proceeding and not an action at law, it is unnecessary to have in the notice the name of a plaintiff and of a defendant. Furthermore, the notices clearly set forth the names of the persons to whom they are addressed. The notices complied with the statute and were reasonably calculated to apprise the persons to whom they were addressed of the pendency of the proceeding and they were afforded an opportunity to defend. Sufficient notice was therefore given.

[18] The objections relating to the amount of the assessment and to the time of levying the same as well as the validity of the orders made February 7, 1938, and August 12, 1938, are also wholly without merit.

The amount of the assessment is well within the limit of contingent liability under the policy and the statute, and the method of computing the same conformed to the statutory requirements. The report, filed within the year as required by Section 422, showed the reasonable value of the assets, the probable liabilities, the probable necessary assessments, and an equitable levy in accordance with Sections 346 and 422 of the Insurance Law. The experience of the liquidator since the submission of his original report upon the assessment indicated an underassessment rather than over-assessment.



[19-21] Nor can the objection of some of the policyholders that they were not notified of the assessment within one year after the expiration or cancellation of their policy, as provided by Section 346, and that they are not subject to assessment because they were not members of the corporation at the time this proceeding against it was instituted, be upheld. The provision for notice is not applicable to an assessment levied in a liquidation proceeding and relates only to assessment made by the corporation as a going concern. *Beha v. Weinstock*, 247 N. Y. 221, 160 N. E. 17. The present liquidation proceeding was commenced on November 10, 1937. This was a date when the liability of the policyholders to assessments for the protection of creditors accrued. It was, therefore, proper for the Superintendent to regard it as the date of constructive notice of such liability,—the company having been closed on account of insolvency. Members whose policies had expired or been cancelled within one year prior to November 10, 1937, were, therefore, to be treated as included among these persons liable to assessments. That treatment by the Superintendent is in accordance with law.

Several policyholders have attempted to extinguish the assessment in whole or in part by off-sets for unearned portions of premiums paid by them and by other claims against the company.

Subdivision 2 of Section 420 of the Insurance Law provides that "No set-off shall be allowed in favor of any such person [meaning a person other than insurer], however, where . . . (c) the obligation of such person is to pay an assessment levied against the members of a mutual insurer or to pay a balance upon a subscription to the capital stock of a stock corporation insurer."

[22, 23] The statute is precise on this point and even in the absence of the statute there could be no such set off. *Lawrence v. Nelson*, 21 N. Y. 158; *Raegener v. Hubbard*, 167 N. Y. 301, 60 N. E. 633; *Commonwealth v. Mass. Mutual Fire Ins. Co.*, 112 Mass. 116, 124; *Standard Printing and Publishing Co. v. Bothwell*, 143 Md. 303, 122 A. 195, 31 A. L. R. 1269. The principle of actual set-off often applied under the bankruptcy or other insolvency laws has no appli-

cation where the obligation is to pay an assessment. The early decision in this state on the point was *Lawrence v. Nelson*, 21 N. Y. 158, where the Court at page 163, referring to a situation of insolvency, said: "When such a state of things exists in a company of mutual insurers, whose members have each an equal interest in its means, and are each creditors as well as debtors, to allow one member or creditor to get more than his share of the common fund by setting off his individual claim in full, and thereby decreasing the shares of his associate creditors, would be unjust and inequitable. \* \* \* The referee therefore correctly decided that the defendants could not set off in full their loss on the 'Galena', but that they were bound to pay their premium notes, and come in, as they proposed to do in regard to their other claims, in a pro rata division of the assets of the company amongst all its members and creditors. What, as mutual insurers, they were ratably entitled to, could only be ascertained after all the means of this association were called in, and the demands upon it liquidated." The claims on account of losses under policies, or for damage for breach of the terms of the policies, or on account of unearned premiums, cannot be asserted as set-offs against the assessment.

[24] Objection by certain policyholders to the assessment on the ground that the order of liquidation caused a breach of the policy contract which relieved them from the payment of the assessment, is without merit. A casualty insurance company which is placed in liquidation simultaneously breaches its policy contracts because the law prevents it from defending actions and performing other terms of the policy. Though this breach by the company gives rise to a provable claim against the fund in the hands of the Superintendent of Insurance (*In re Empire State Surety Company*, 214 N. Y. 553, 570, 108 N. E. 825) it does not relieve the policyholder from liability for assessment under Sections 422 and 423 of the Insurance Law. To hold otherwise would be tantamount to ruling that the institution of liquidation proceedings on the ground of insolvency, which is the very foundation for the levy of the assessment, at the same time causes a breach of contract which affords

a complete defense to the collection of the assessment. This would destroy the purpose of the statute. The breach of contract is no defense to the assessment though damage resulting from the breach may be provable against the fund.

The Superintendent will submit an order disposing of the issues raised by the objections, in accordance with this opinion.

**EXHIBIT "B".****THE STATE OF SOUTH CAROLINA IN THE SUPREME COURT.**

LOUIS H. PINK, Superintendent of Insurance of the State  
of New York, *Appellant-Respondent*,

*v.*

T. B. AARON, *et al.*, *Respondents-Appellants*

Appeal from Richland County, E. H. Henderson, Judge.

Case No. 2091.

OPINION No. 15223—Filed March 3, 1941

**AFFIRMED**

Thomas, Cain & Black, of Columbia, for appellant-respondent.

Colin S. Monteith, Jr., Edwin H. Cooper, and Frank A. Graham, Jr., all of Columbia, for respondents-appellants, and R. McC. Figg, Jr., of Charleston, for certain respondents.

BONHAM, C. J.:

The Auto Mutual Indemnity Company is incorporated under the laws of the State of New York; it has policy holders in this and States other than New York. It became financially involved. The Supreme Court of New York, by its order, placed the Company in rehabilitation. Upon a proper showing by the liquidator that an assessment against all members (policy holders) of the Company was necessary to meet the liabilities of the Company, an order of the Court was made directing that such assessment be made. Thereupon, the liquidator computed the amount due by each policy holder, including the defendants in this action, and the Court ordered the members to pay to the liquidator the amount assessed against them.

The present action was brought in the Court of Common Pleas for Richland County against the defendants, as resi-

dents of the State of South Carolina, and certain of them (named) as residents of Richland County, to collect the assessment levied against each of them as set forth in Exhibit A attached to the complaint.

The complaint alleges that the action is in the nature of a Creditor's Bill instituted for the purpose of marshaling the assets of the said Auto Mutual Indemnity Company.

Certain of the defendants demurred to the complaint on the first, fifth and sixth grounds thereof namely:

“(1) That this Court has no jurisdiction of the subject of the action for the reason that the complaint fails to allege and shows on its face that a petition or complaint by the plaintiff creditor, on behalf of himself and all other such creditors, was ever filed in a Court in the State in which the Auto Mutual Indemnity Company was domiciled, asking that said company be declared insolvent and for the appointment of a liquidator to wind up its business and affairs, or that said company was ever a party defendant in any action brought for the purpose of determining its insolvency and establishing the amount of the assessment liability of its members, or that a final adjudication thereof had been rendered and judgment entered thereon, or that any order of Court was ever signed and filed authorizing the plaintiff to maintain any such action as this in the State of South Carolina; that the New York Court did not acquire jurisdiction over the defendant and, therefore, had no power to render any such judgment against this defendant; and that the plaintiff further fails to allege any New York statutes authorizing such a judgment.”

“(5) That several causes of action have been improperly united in that the complaint alleges that the party defendants hereto are liable for an assessment and in addition thereto are liable for other indebtedness, and further that each separate action against each defendant arises out of different facts and under separate contracts and to which there are separate defenses.

“(6) That the complaint does not state facts sufficient to constitute a cause of action for the reason that the said complaint fails to show on its face the existence of any

contract of insurance entered into by and between the said Auto Mutual Indemnity Company and the party defendants hereto or that a contract of insurance issued by said Auto Mutual Indemnity Company provides for the levying of an assessment against its members and furthermore said complaint has failed to allege the provisions of Section 8100, 1932 Code of Laws of South Carolina, which provides that a mutual company not possessed of assets at least equal to the unearned premium reserve, and other liabilities shall make an assessment to provide for such deficiency upon only such members as are liable in preportion to their several liabilities as expressed in their policies and that each such member shall be liable only on account of losses and expenses incurred while his policy was in force."

Certain other defendants demurred as follows:

"3. That it appears on the face of the complaint that the action is alleged to be a creditor's bill, brought by the plaintiff as representing and in the right of the debtor, to wit, the defunct insurance corporation, and the plaintiff is not a creditor of said corporation, and no cause of action in the nature of a creditor's bill lies either in plaintiff's favor or in favor of the defunct corporation against the alleged debtors of the defunct insurance corporation."

"2. That it appears on the face of the complaint that there is a misjoinder of the causes of action, in that the causes of action against the several defendants are separate and distinct, and not joint, and under the law cannot be joined in the same complaint."

The demurrers were heard by His Honor, Judge Henderson, who filed the following order.

"This case comes before me on demurrers interposed by several of the defendants.

"The grounds of the demurrers are that the Court has no jurisdiction of the person of the defendant or the subject of the action; that the plaintiff has not legal capacity to sue; that there is a defect of parties plaintiff and defendant; that the complaint does not state facts sufficient to

constitute a cause of action; and that several causes of action have been improperly united.

"I have given careful consideration to the oral arguments, and the very helpful written briefs which were filed with me, and I am of opinion that all of the grounds of the demurrers, except the last one, should be overruled. I think, though, that the demurrers should be sustained on the ground that several causes of action have been improperly united.

"The complaint alleges that Auto Mutual Indemnity Company was a mutual insurance company, under the laws of the State of New York; that on November 12, 1937, an order was made by the Supreme Court of the State of New York, placing the company in rehabilitation; that, being insolvent, it was later placed in liquidation by that Court; that the plaintiff, Louis H. Pink, is the liquidator; that thereafter the plaintiff filed a report showing the condition of the company's affairs and the necessity of an assessment; that the New York Supreme Court thereupon entered an order adjudging an assessment against all members of the company, including all of the defendants herein; that plaintiff computed the amount due by each policy holder and the New York Court ordered each member during the year prior to November 10, 1937, including each defendant herein, to pay the amount assessed against him to the plaintiff; that in addition to the assessments, the New York Court ordered the members to pay the amount of other indebtedness due by them, to the plaintiff; that a certain stated sum is due by each defendant; that the action is in the nature of a creditor's bill instituted for the purpose of marshaling the assets of the insurance company, and that all monies collected by this proceeding will be merged with all other collections of liabilities, and will be distributed ratably among all the creditors of the company.

"It will thus be seen that the New York Court has already ascertained the indebtedness of the company, and has adjudicated the necessity for assessments against the members, as well as definitely fixing the amount due by each policy holder.

"The plaintiff's action is not one to determine the necessity for an assessment or the amount of it.



"The necessity and amount of assessment having been established in New York, the plaintiff, as statutory liquidator, has a cause of action in law against each of the policy holders for the amount due by each one upon his separate agreement."

. . . . .

(That portion of the decree dealing with misjoinder of causes of action is omitted because not material here. The plaintiff's exceptions on this ground are also omitted.)

The defendants appeal upon two exceptions as follow:

"1. Because the Court erred in failing to sustain the demurrers on the ground that the plaintiff failed to state a cause of action, as it appears on the face of the complaint that the statutes of New York, applicable to the case, were not properly plead.

"2. Because the Court erred in not sustaining the demurrers on the ground that it appears on the face of the complaint that the plaintiff did not acquire jurisdiction of certain of the defendants for the reason that said defendants were not members and policyholders of the Auto Mutual Indemnity Company at the time said company was placed in liquidation."

Judge Henderson also granted two orders, dated June 15, 1940, and October 23, 1940, by which the place of trial of this action was changed to the counties of the residence of the defendants named in said orders. From these orders the plaintiff likewise appeals.

The Court is satisfied with the views expressed in the order of Judge Henderson. He gives "full faith and credit" to the orders of the New York Court. The Court of New York does not undertake to give judgment against these members of the company resident in South Carolina. It seeks by its agent, the liquidator of the Company, appointed by it, to collect the amounts assessed against the policy holders resident in this State by his action in the Courts of this State. The Circuit Order recognizes the

liquidator's right so to do, but it holds that plaintiff has exceeded his right when he assumes to sue all such policy holders in a joint action. He has erred by joining all of them in one action.

\* \* \* \* \*

The order appealed from is affirmed. \* \* \*.

Baker and Fishburne, JJ., and L. D. Lile and J. Strom Thurmond, Circuit Judges, A.A.J., concur.

(3622)

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1940.**

**No. 932 48**

**LOUIS H. PINK, Superintendent of Insurance of the State of New York,**

*Petitioner,*

*vs.*

**A. A. A. HIGHWAY EXPRESS, INC.; H. A. ADAMS, Trading as Adams Transfer Co.; H. L. BASS, as Bass Bus Line; SERVICE COACH LINE, INC.; EAST & WEST MOTOR LINES, ROY R. REAGIN, GEORGIA MOTOR EXPRESS, INC., S. S. SALE, SALE TRANSFER CO., SOUTHEASTERN STAGES, INC., EVERREADY CAB COMPANY, J. H. BOOKER, d/b/a Savannah Beach Line and/or Atlantic Stages; FLETCHER T. KAYLOR, d/b/a Kaylor Transfer Co.; J. F. MURRAY, d/b/a Georgia Alabama Coach Line; KALER PRODUCE COMPANY, COX BROS. UNDERTAKING CO., INC., ATLANTA MACON MOTOR EXPRESS, INC., SOUTHEASTERN MOTOR LINES, INC., and/or Cedartown Bus Line, J. RUSSELL, d/b/a Russell Transfer Co., CONTINENTAL CARRIERS, INC., BATEMAN COMPANY, INC., DOWNIE BROTHERS CIRCUS, KINNETT ODOM COMPANY, INC., SOUTHERN STAGES, INC., WEATHERS BROS. TRANSFER CO., INC., M. & A. MOTOR FREIGHT LINES, INC.**

**SUPPLEMENTAL AND REPLY BRIEF FOR  
PETITIONER.**

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# SUPREME COURT OF THE UNITED STATES.

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OCTOBER TERM, 1940.

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**No. 932**

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LOUIS H. PINK, Superintendent of Insurance of the State of New York,

*Petitioner,*

*vs.*

A. A. A. HIGHWAY EXPRESS, INC.; H. A. ADAMS, Trading as Adams Transfer Co.; H. L. BASS, as Bass Bus Line; SERVICE COACH LINE, INC.; EAST & WEST MOTOR LINES, ROY R. REAGIN, GEORGIA MOTOR EXPRESS, INC., S. S. SALE, SALE TRANSFER CO., SOUTHEASTERN STAGES, INC., EVERREADY CAB COMPANY, J. H. BOOKER, d/b/a Savannah Beach Line and/or Atlantic Stages; FLETCHER T. KAYLOR, d/b/a Kaylor Transfer Co.; J. F. MURRAY, d/b/a Georgia Alabama Coach Line; KALER PRODUCE COMPANY, COX BROS. UNDERTAKING CO., INC., ATLANTA MACON MOTOR EXPRESS, INC., SOUTHEASTERN MOTOR LINES, INC., and/or Cedartown Bus Line, J. RUSSELL, d/b/a Russell Transfer Co., CONTINENTAL CARRIERS, INC., BATEMAN COMPANY, INC., DOWNIE BROTHERS CIRCUS, KINNETT ODOM COMPANY, INC., SOUTHERN STAGES, INC., WEATHERS BROS. TRANSFER CO., INC., M. & A. MOTOR FREIGHT LINES, INC.

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## SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER.

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### I.

THE QUESTION INVOLVED IS ONE OF GREAT INTEREST IN DETERMINING THE QUALIFICATION OF INSURERS ACCEPTABLE TO THE MOTOR CARRIER DIVISION OF THE INTERSTATE COMMERCE COMMISSION (Original Brief, pp. 14, 15).

The record and petition having been brought to the attention of the Interstate Commerce Commission, the division having charge of insurance (Bureau of Motor Car-

riers) has informed petitioner of its interest. An excerpt follows:

"The principal question involved, as I understand it, is whether liability to assessment imposed by the laws of the State of domicile of a mutual casualty company can be enforced in the courts of another state in which different laws as to such assessments prevail.

"The question is one of great interest to this Commission both so far as the particular case is concerned and also as affecting generally its function of determining the qualifications of insurers. The insurer involved is the Auto Mutual Indemnity Company of New York. At the time it was placed in liquidation there were three hundred sixty-eight certificates of insurance issued by this company on file with this Commission as security for the protection of the public. The extent of the claims under these certificates is not known, since the Commission has no jurisdiction to enforce such claims, but it is naturally interested in seeing that the public is actually protected."

The three hundred sixty-eight motor carriers referred to above were engaged in interstate commerce. Their activities covered many states and certainly affect many people. The rights of all of them await an authoritative decision of the conflicting questions involved.

## II.

### THE BRIEF OF DEFENDANTS ADMITS DISCRIMINATION AGAINST PETITIONER.

The brief of the defendants cites statutes applicable to companies organized under the statutes of Georgia (page 7); applicable to fire and life insurance companies (page 8), and to assessment life insurance companies (page 9). They do not contend that these statutes are applicable to **mutual casualty companies**. Nor does the brief deny that under

the general law of Georgia, governing mutual companies (Carlton v. Southern Mutual Life Insurance Company, 72 Ga. 372; our brief, p. 20), "each assured becomes interested in profits and **liable for losses.**" By their failure to deny it, defendants admit that when the action is brought by a resident of Georgia against a policyholder in a mutual company, liability to assessment may not be resisted **because the policy contains no reference to the Constitution and by-laws.**

**Alma Gin & Milling Co. v. Peeples**, 145 Ga. 722 (Our Brief, p. 20).

A construction of the Georgia statutes whereby its own residents may recover assessments from members of an insolvent mutual company, whose policies did not include in their face a reference to the by-laws imposing liability for assessment, but denying the privilege when asserted by residents of other states, discriminates against citizens of other states, in violation of the Constitution of the United States, Article IV.

The decision of the Georgia Supreme Court is in conflict with the principles announced by this Court in **Blake v. McClung**, 176 U. S. 59, at 67, 44 L. ed. 371, at 374, holding:

"The judgment of the state court \* \* \* so far as it gave priority to citizens of Tennessee over citizens of other states, was inconsistent with the second section of the Fourth Article of the Constitution of the United States."

And with the decision of this Court in **Sully v. American National Bank**, 178 U. S. 289, at 300, 44 L. ed. 1072, holding:

"If the statute does not permit such postponement against a resident mortgagee, then the postponement in the case of a nonresident mortgagee would be invalid."



III.

WHETHER THE STATE HAS DENIED TO A FOREIGN CORPORATION THE PRIVILEGE OF DOING BUSINESS ON A LEVEL WITH DOMESTIC CORPORATIONS IS A QUESTION FOR THE DETERMINATION OF THE FEDERAL COURTS.

Defendants insist that the construction of the policy by the state court is conclusive of the right asserted. This Court has often ruled to the contrary.

In **Hanover Fire Insurance Co. v. Carr**, 272 U. S. 494, at 510, 71 L. ed. 372, at 380, a similar argument was considered and rejected, the Court holding:

"But this court, although bound by the construction that the supreme court may put upon the statute, **is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect.**" (Emphasis ours.)

Respectfully submitted,

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1941.**

**No. 48.**

**LOUIS H. PINK, Superintendent of Insurance of the  
State of New York,  
Petitioner,**

**v.**

**A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as  
ADAMS TRANSFER CO., H. L. BASS, as BASS  
BUS LINE, et al.,  
Respondents.**

**On Writ of Certiorari to the Supreme Court of the  
State of Georgia.**

**BRIEF OF PETITIONER.**

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# **SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1941.

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No. 48.

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LOUIS H. PINK, Superintendent of Insurance of the  
State of New York,  
Petitioner,

v.

A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as  
ADAMS TRANSFER CO., H. L. BASS, as BASS  
BUS LINE, et al.,  
Respondents.

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On Writ of Certiorari to the Supreme Court of the  
State of Georgia.

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## **BRIEF OF PETITIONER.**

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The case comes to this Court on the grant of the writ of certiorari to the Supreme Court of Georgia, to review a decision of that Court, announced January 16, 1941 (adhered to on rehearing February 14, 1941), affirming a final judgment of the Superior Court of Fulton County, Georgia, which dismissed, with opinion (R. 80-81), the bill in equity brought by petitioner against the respondents herein.

### **I.**

#### **JURISDICTION.**

(a) The judgment sought to be reversed was a final judgment of the Superior Court of Fulton County, Georgia, sustaining a demurrer interposed by the defendants to

the bill of complaint filed by petitioner, and dismissing the same with costs (R. 80-81). Under Georgia procedure an appeal lies directly to the Supreme Court on such a judgment by bill of exceptions. The Supreme Court of Georgia considered the appeal of plaintiff and denied with opinion.

(b) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, and the cases of **Roche v. McDonald**, 275 U. S. 449; **Sovereign Camp Woodmen of the World v. Bolin**, 305 U. S. 65, 83 L. Ed. 45, and **Adams v. Saenger**, 303 U. S. 57, 82 L. Ed. 649-652.

(c) The Supreme Court of Georgia passed upon the constitutional questions asserted in the trial court and denied them (R. 89-90). **The opinion of the court below** is reported in 191 Georgia 502, 13 Southeastern Reporter (2d) 337, and is appended to the record (R. 82-96, inclusive).

## II.

### SUMMARY STATEMENT OF THE QUESTIONS INVOLVED.

Petitioner, the statutory liquidator of an insolvent mutual insurance company, chartered under the laws of New York, whose statutes, as construed by the courts of that State, confine these corporations to the writing of assessable policies only, filed suit against members residing in Georgia.<sup>1</sup> His suit was dismissed on general demurrer and this action affirmed by the highest court of review. Briefly the controversy may thus be stated:

Petitioner contends that the respondents, voluntarily negotiating for and receiving casualty insurance in a mu-

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<sup>1</sup> Petitioner charged respondents with liability for (a) the assessment levied on all policyholders after its approval by the domiciliary court, and (b) premium balances due by some of them [R. 10 (14)].

tual association, incorporated under the laws of New York, thereby occupied a dual position. (a) They became **members** of a **mutual** insurance association, **entitled to participate in the profits** and **subject to assessment for its losses**, and (b) they obtained a contract of indemnity against casualty losses, governed by the terms of their policies. Petitioner further claimed that the status of these respondents, as members, must be determined by the laws of New York.

Respondents contended that the mere act of obtaining insurance in a mutual company did not create the status of membership in the corporation unless the policies which they received contained some reference to the New York laws, particularly the assessable feature thereof, and that since neither the statute nor the provisions for assessment in the charter and by-laws appeared on the face of the policies,<sup>1</sup> the relationship to the company was that of insured only; that they had not become members and consequently were not mutual insurers. They contended that the policy of insurance becoming effective in Georgia only, the laws of that State would be examined to determine their status. The Courts below agreed with the respond-

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<sup>1</sup> Respondents were not charged with liability arising out of the insurance policy; indeed, the insurance policy was not declared on in the original petition (R. 7); it was attached by amendment in response to a special demurrer interposed by one of the respondents and exhibited only as evidence of membership and not as a basis for liability. The policies merely proved that the respondents were members, and this could have been established by other evidence.

Compare *Lloyd, Supt., v. Cincinnati Checker Cab Co.*, ... Ohio .... 36 N. E. (2) 67, a case almost identical in its facts and applicable principles of law. There the Court, after examining defenses identical with those here asserted, said:

"While, at first, there seems merit in the argument, it is evident that, as has been indicated, the liability is not necessarily created by the voluntary assumption of contingent liability, but because the law requires such liability to exist in every policy contract. The contract is, therefore, merely used to identify the defendant as a member of a class subject to assessment of such contingent liability. It is evident that the defendant is so liable. Such identification could be established otherwise, and is admitted by the defendant in his answer and cross petition" (here admitted by demurrer).

ents, specifically ruling that the laws of Georgia, and not the laws of New York, controlled, and that persons receiving policies from a mutual insurance corporation **did not become members thereof, though under the provisions of the New York law they would be members.**

Having found that the respondents were not members, the Court below found that the judgments in the New York proceedings could not be enforced against Georgia residents **without violating their constitutional rights to a day in court.**

### III.

#### **SUMMARY STATEMENT OF PLEADINGS.**

Petitioner is the Superintendent of Insurance of the State of New York and statutory successor of insolvent insurance corporations chartered in that State. On the 13th day of October, 1939, he filed a bill in equity in the Superior Court of Fulton County, naming as defendants certain individuals and corporations, alleging them to be members and policyholders of Auto Mutual Indemnity Company (R. 7 to 18).

He alleged that the Company, by its charter, was authorized to issue casualty policies on a mutual plan only; that the applicable statutes of New York contained mandatory provisions confining membership of the corporation to its policyholders; that mutual insurance companies of this character must provide in their charters and by-laws for the levy of an assessment in case of deficiency of assets, and that every member is obligated to pay assessments not exceeding twice the amount of his annual premium, upon receiving notice thereof.

He alleged further that after the Company had been taken over for liquidation under a judgment of the New

York Supreme Court, his recommendation for the levy of a 40 per cent assessment against all members and policyholders had been approved by the Court; that thereafter he had computed the amounts due by each member, including the Georgia defendants, also other indebtedness due for premiums.

His second report containing a computation of the amount due by each defendant under the assessment and other indebtedness due was filed in the case and on November 18, 1938, a Justice of the Supreme Court of New York entered a decree finding that notice had been mailed to the last known address of the members shown on the books of the insurer and newspaper publication had also been made, all as provided for in the statutes of New York dealing with the liquidation of insolvent mutual insurance companies, and approving the correctness of the reports aforesaid (R. 38).

Relevant sections of New York law covering the liquidation of insolvent insurance companies and assessments therein were attached as exhibits to the pleadings (Amendment of July 25, 1940 [R. 18-44, inclusive], and Amendment of August 14, 1940 [R. 44-46]). The charter (Article 4) provided that "the members of the corporation shall be the policyholders therein." And in the same pleadings (Amendment of July 25, 1940 [R. 22-23], petitioner alleged the law of New York to be:

"It is the law of New York that every person who accepts a policy of insurance in a mutual insurance company thereby becomes a member thereof. . . .

"It is the law of New York that the aforesaid section 346 compels the Company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed

in accordance with Section 346 of the New York Insurance Law. \* \* \*

“It is the law of New York that the laws of that state govern the rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that state.”

And that “Every person who was a member of a mutual insurance company at any time within the twelve months prior to the date of the commencement of \* \* \* liquidation proceedings \* \* \* is liable to assessment in accordance with Section 346 of the New York Insurance Law.”

The New York proceedings are summarized in the report of the Referee (14 N. Y. Supp. [2] 601). This opinion is annexed to the brief filed with the petition for certiorari.

All policies contain the standard clause entitling persons obtaining judgments against the insured to proceed against the insurance company under the terms of the policy to the same extent as the insured (R. 48A). The **names of many defendants indicate their business as public carriers**. By the statutes of Georgia and other states in which they did business, as well as by the provisions of the Interstate Commerce Act, the filing of their policies was a condition to the exercise of their certificates of public convenience. Against these policies the public has a direct right of action.

The mutual nature of the company appears from its name, from the profit-sharing provisions in the face of the policy, and on the back of the policy is a specific recitation that “The Insured is hereby notified that by virtue of this Policy he is a member \* \* \* entitled to vote \* \* \* at any and all meetings of said company,” and that “The contingent liability of the named Insured under this policy shall be limited to one year from the expiration or cancel-

lation hereof and shall not exceed the limit provided by the Insurance Law of the State of New York."

Defendants moved generally to dismiss the bill because (a) it appeared that the policies had been delivered in Georgia, and (b) because the policies contained no provisions on their face for assessment nor reference to the by-laws. Although these defenses challenge presently their right to recover assessments and inferentially admitted the liability for premiums, the Court sustained the demurrer and dismissed the entire bill (R. 80-81). The Supreme Court of Georgia affirmed with opinion (R. 82-96). Although the right to recover premiums was insisted upon (R. 98) a rehearing was denied generally without opinion (R. 107).

The Supreme Court of Georgia construed petitioner's allegations that the defendants were policyholders and members as an averment that defendants were members because they were policyholders. Finding that the policies were delivered in Georgia, **the Court ruled inapplicable the statutes of New York and the orders and decrees in the liquidation proceedings.**

It concluded that the acceptance of the policy did not make a policyholder a member liable to assessment in accordance with the laws of the state of the company's domicile, although a reference to this liability appeared on the back of the policy "there being in the face of the policy no reference to any contingent liability or assessment, or to any law providing for such," and that this was true notwithstanding the charter of the company "provides that members shall be the policyholders, that its by-laws provide that every member shall be liable to assessment, and that the insurance law of the State of the Company's domicile contains a like provision."

**It concluded that Georgia residents were not bound by**



**the liquidation proceedings in New York** because they had not been personally served, but only by mail, pursuant to the New York statutes. It deemed the service on the corporation insufficient, and held that the **rulings of this Court that the rights of members of a mutual corporation must be determined by the single law of the domicile of the corporation, were applicable only to fraternal orders** having a lodge system and not applicable here, and that only Georgia law would be applied (R. 82).

**It considered the contention** advanced by petitioner **that his rights** to collect a fund for the payment of creditors, based upon assessments authorized by the statutes of New York and confirmed by the judgments of its courts, **were protected by the full faith and credit clause of the Federal Constitution** (Article 4, Section 1), and denied it (R. 87-90).

Finally, it concluded that the rights of the defendants, **under the Fourteenth Amendment** of the Constitution of the United States, **prevented enforcement of assessment rights based upon the statutes of New York** and a charter granted thereunder (R. 89-90).

#### IV.

### **FEDERAL QUESTIONS WHICH WILL BE URGED IN THIS COURT.**

1. The statutes under which the Auto Mutual Indemnity Company was incorporated, its charter and by-laws, were not accorded the full faith and credit to which they were entitled under Article IV, Section 1, of the Constitution of the United States.

2. The judgment dismissing the petition and the opinion of the Supreme Court of Georgia denying all relief to a statutory liquidator of an insolvent mutual insurance com-

pany, chartered under the laws of New York, who sues to recover a balance of premiums admittedly due, and assessments levied in accordance with the statutes and charter provisions, is a violation of the rights guaranteed to him under the full faith and credit provision of the Constitution of the United States, Article IV, Section 1, and of the Fourteenth Amendment.

3. Refusal to accord recognition to the orders and decrees of the Supreme Court of New York, entered in the liquidation proceedings, entitled "**In re Auto Mutual Indemnity Company**, 14 N. Y. Supp. (2) 601," which adjudged the necessity for assessment and specifically adjudicated the liability to assessment of policyholders holding policies identical to those of the defendants residing in Georgia, is a denial of the full faith and credit due to the judgments of a sister State, guaranteed by Article IV, Section 1, of the Constitution of the United States aforesaid.

4. The orders and decrees of the domiciliary court approving the assessment, dated February 7, 1938 (R. 8, paragraph 6 original petition): the decree overruling exceptions by residents of South Carolina to the assessment on the ground that the policies contained no provision for assessment (being the identical policies involved here), and the order of the Supreme Court of New York, dated August 12, 1938 (R. 8, paragraph 8 original petition), approving assessments against all policyholders whose policies were similar to the typical policy in the record (R. 47), which included all of the defendants, were adjudications of the liability to assessment of policyholders of this class. In holding that Georgia policyholders were not liable to assessment, the Court denied full faith and credit to the judgments aforesaid.

V.

**SUMMARY OF ARGUMENT.**

**Whether the liability of the defendants shall be measured by the laws of New York or the laws of Georgia raises a federal question.**

Hancock National Bank v. Farnum, 176 U. S. 640;  
Adam v. Saenger, 303 U. S. 59, 64;  
Constitution of the United States, Section 1, Article IV;  
Sovereign Camp W. O. W. v. Bolin, 305 U. S. 65.

**The laws of the state where the corporation was chartered control the rights and liabilities of the stockholders and members.**

Supreme Council of Royal Arcanum v. Green, 237 U. S. 531;  
Sovereign Camp W. O. W. v. Bolin, *supra*;  
Chandler v. Peketz, 297 U. S. 609;  
Hartford Steam Boiler Co. v. Harrison, 301 U. S. 459, 464;  
Taggart, Insurance Commissioner, v. Wachter, Hoskins & Russell, Inc., 21 Atl. Reporter (2) 141;  
Pink, Supt., v. Aaron et al., 13 S. E. (2) 489;  
Pink, Supt., v. Town Taxi Co., Inc., 21 Atl. (2) 656.

**The laws of New York, under which the corporation was chartered, impose a contingent liability on all policyholders.**

Factory Mutual Liability Ins. Co. v. Behan, 253 N. Y. S. 562, 564;  
Beha v. Weinstock, 247 N. Y. 221, 160 N. E. 17.

**The contingent liability imposed by New York law is property in which creditors have a vested right.**

Corning v. McCullough, 1 Comstock 47, 49 Am. Dec. 287, 290;  
Coombes v. Getz, 285 U. S. 434, 448.

**Liability to assessment arises from the voluntary action of the policyholder and the burden imposed by statute.**

Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888,  
49 L. R. A. 301,

cited with approval by this Court in **Bernheimer v. Converse**, 206 U. S. 615.

Concord First National Bank v. Hawkins, 174 U. S.  
364, 372;

Beha v. Weinstock, 247 N. Y. 221, 160 N. E. 17;

Mutual Insurance Co. v. Korn, 7 Cranch. 396;

Modern Woodmen v. Mixer, 267 U. S. 544;

In re Auto Mutual Indemnity Company, 14 N. Y. S.  
(2) 601.<sup>1</sup>

**Respondents, as public carriers, sustain a liability direct to the public.**

Merchants Mutual Ins. Co. v. Smart, 267 U. S. 129;  
Blashfield's Automobile Laws, Vol. 1, p. 131.

**Provisions of insurance law made mandatory by statutory requirement are read into the policies if omitted.**

Bakker v. Aetna Life Ins. Co., 264 N. Y. 150, 190  
N. E. 327;

Newton v. Employers Liability Assurance Corporation,  
107 Fed. (2) 164;

National Union Fire Ins. Co. v. Wanberg, 260 U.  
S. 71;

Merchants Mutual Ins. Co. v. Smart, *supra*;

Fire Asso. of Philadelphia v. New York, 119 U. S.  
110;

Cogliano v. Ferguson, 139 N. E. 527;

Southern Surety Co. v. Chambers, 115 Ohio St. 434,  
154 N. E. 786, 787.

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<sup>1</sup> The complete text of this opinion appears as an exhibit to the brief accompanying the petition for certiorari in this court.

**In denying to petitioner the right to recover premiums admittedly due, the judgment deprived him of rights guaranteed by the Constitution of the United States.**

Relfe v. Rundle, 103 U. S. 222;  
Clark v. Williard, 292 U. S. 112, 129;  
Broderick v. Rosner, 294 U. S. 629;  
Coombes v. Getz, *supra*, 285 U. S. 434.

**Residents of Georgia received notice of and were bound by the New York proceedings.**

Milliken v. Meyer, No. 66, October Term, 1940, 85  
L. ed. 269, 272;  
Bernheimer v. Converse, *supra*, 206 U. S. 516;  
Taggart, Ins. Commissioner, v. Wachter, Hoskins,  
Russell, Inc., 21 Atl. (2) 141;  
Marin v. Augedahl, 247 U. S. 142.

**The assessment recommended by the liquidator, having been approved by the Court, became *res adjudicata* against all defendants.**

Broderick v. Rosner, *supra*, 294 U. S. 629;  
Chandler v. Peketz, *supra*, 297 U. S. 609;  
Marin v. Augedahl, 247 U. S. 142;  
Hancock National Bank v. Farnum, *supra*, 176 U. S.  
640, 644.

**By application of the laws of Georgia instead of the laws of New York and the decisions of its courts, petitioner was deprived of constitutional rights duly asserted.**

Conclusion of Brief, p. 49;  
Motion for Rehearing in Georgia Supreme Court  
(R. 98, 99, 100, 101) (R. 106, 107);  
Sovereign Camp W. O. W. v. Bolin, *supra*, 305 U.  
S. 65.

VI.

**BRIEF AND ARGUMENT.**

**JURISDICTION OF THE COURT.**

Federal questions were seasonably asserted<sup>2</sup> and distinctly passed upon. The Supreme Court of Georgia thus summarized them below (R. 90):

“Counsel for the plaintiff take the position that to deny the element of conclusiveness to the decree of the New York Court upon the question of liability of each of the defendants to assessment would be to refuse to give effect to the full faith and credit clause of the Constitution of the United States. The answer to that contention is, that before that constitutional provision can become operative one must have had his day in court; and over against it we place the other guaranty, to wit, the due-process clause; and it is of the essence of due process that one must be given an opportunity to be heard.”

In **Hancock National Bank v. Farnum**, 176 U. S. 640, 642, 44 L. ed. 619-620, this Court said:

“The plaintiff’s contention that these federal pro-

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<sup>2</sup> Throughout his petition (R. 7-20) petitioner relied upon the statutes of New York (R. 8, 9, paragraphs 5, 10, 13; R. 20, paragraphs 1, 2; R. 21 to 30, inclusive) and the judgments of its courts (R. 7, paragraphs 3, 4, 6, 8, 9, and R. 29, paragraphs 5, 7, 8; R. 30, Exhibit C; R. 32, Exhibit D; R. 34, Exhibit E; R. 35, 37, 40, Exhibit G), and by amendment [R. 44 (2)] he pleaded additional provisions of the New York statute.

The trial court in sustaining the demurrer and dismissing the case did so because the “petition fails to make out a case of liability for assessment” (R. 81), but supplemented this judgment on August 23, 1940, by overruling all other defenses except the one above asserted.

The defendants asserted that they were bound “only by the laws of the State of Georgia” (R. 51); that the insurance laws of New York were irrelevant [R. 52 (4); R. 54 (4)]; that they were not bound by the orders made in the New York courts (R. 60, paragraphs 3, 5); that the laws of Georgia were applicable and the New York laws were not (R. 61-62, paragraphs 7, 8), and that the judgments of the New York courts were void under named amendments to the Constitution of the United States [R. 62, 63; also R. 67, 69, 70 (5), 71 (8)].

A respondent (R. 74) challenges the sufficiency of the New York statutes to bind him [R. 76 (9-b)] and contended that the policies were ordinary insurance contracts, containing no reference to the laws of New York. Another respondent (R. 77, 79) urged similar defenses.

visions required a decision different from that made by the state court was distinctly presented and ruled against. The jurisdiction, therefore, of this court, is clear."

And in **Adam v. Saenger**, 303 U. S. 59-64, 82 L. Ed. 649, at 652, the Court said:

"Whether the question be regarded as one of fact or more precisely and accurately as a question of law to be determined as are other questions of law, \* \* \* it is one arising under the Constitution and a statute of the United States which commands that such faith and credit shall be given by every court to the California proceedings 'as they have by law or usage' of that state. And since the existence of the federal right turns on the meaning and effect of the California (New York) statute, the decision of the Texas (Georgia) court on that point, whether of law or of fact, is reviewable here."

**Section 1, Article IV**, of the Constitution of the United States provides:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The effect of the congressional declaration provided for in the foregoing constitutional provision is well summarized in **Hancock National Bank v. Farnum**, *supra*, 176 U. S. 640, 642:

"Such is the congressional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. In other words, the **local effect must be recognized everywhere** through the United States."



The controlling question in the case is whether the rights of petitioner and the liabilities of the respondents shall be determined by the laws of Georgia or the laws of New York. This raises a federal question, usually examined by this Court on certiorari. An identical case is **Sovereign Camp W. O. W. v. Bolin**, *supra*, 305 U. S. 65.

THE LAWS OF THE STATE WHERE THE CORPORATION WAS CHARTERED CONTROL THE RIGHTS AND LIABILITIES OF THE STOCKHOLDERS AND MEMBERS.

This case is controlled by recent precedents in this Court. In many respects the pleadings in the case are identical with the pleadings involved in **Supreme Council of Royal Arcanum v. Green**, 237 U. S. 531, 59 L. ed. 1089; **Sovereign Camp Woodmen of the World v. Bolin**, 305 U. S. 65, 83 L. ed. 45, and **Chandler v. Peketz**, 297 U. S. 609, 80 L. ed. 881.

As was pointed out by this Court in **Royal Arcanum v. Green**, *supra* (l. cit. 545):

“ \* \* \* the settled principles \* \* \* applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that state.”

The errors here assigned, being of a similar nature, we will discuss the applicable principles by an examination of the three cases cited above.

Paraphrasing somewhat the language of the Georgia Supreme Court, the first premise on which its decision is based (Opinion of Court, R. 82 [4]) is:

Liability to assessment of persons holding policies in a

mutual company chartered by the laws of New York will be determined by the laws of Georgia and not of New York.

But this Court, in **Royal Arcanum v. Green**, *supra*, held the contrary. It said (C. cit. 542):

“Moreover, as the charter was a Massachusetts charter, and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that state, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws.”

Laying to one side for the moment the reasons which justified the rulings of the Court we proceed to the rule itself:

“In fact, while dealing with various forms of controversy, in substance all these cases come at last to the principle so admirably stated by Chief Justice Marshall more than a hundred years ago (*Head v. Providence Ins. Co.*, 2 Cranch. 127, 167, 2 L. ed. 229, 242) as follows: ‘Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers.’

“In addition it was by the application of the same principle that a line of decisions in this court came to establish; first, that the law of the state by which a corporation is created governs in enforcing the liability of a stockholder as a member of such corporation to pay the stock subscription which he agreed to make; second, that the state law and proceedings are binding

as to the ascertaining of the fact of insolvency and of the amount due the creditors entitled to be paid from the subscription when collected.”

**Royal Arcanum v. Green**, *supra* (l. cit. 544).

The Georgia Supreme Court refused to follow the principles announced in **Royal Arcanum v. Green** because the decision there involved a fraternal order having a ritualistic system.<sup>3</sup> But that decision was based upon principles established more than one hundred years ago. These principles do not depend upon rituals or uniforms. The doctrine is equally applicable to a mutual insurance company, because the relationship of a policyholder to a mutual insurance company is analogous to the relationship of a member of a fraternal organization to his society.

As this Court clearly pointed out in **Mutual Life Insurance Co. v. Phinney**, 178 U. S. 327, at 344:

“The contract of insurance is a peculiar contract, especially when made with a mutual insurance company, for, although in terms a contract with a corporation, it is in substance a contract between the insured and all other members of that company.”

The doctrines established in the **Royal Arcanum** case, *supra*, are applicable here, and that they are conclusive is beyond dispute.

“That they are applicable clearly results from the fact that although the issues here presented as to things which are accidental are different from those which were presented in the cases referred to, as to every essential consideration involved the cases are the same and the controversy here presented is and has been, therefore, long since foreclosed.”

**Royal Arcanum v. Green**, *supra* (L. Cit. 544).

<sup>3</sup> [R. 83 (5)] “ \* \* \* acceptance of a policy of \* \* \* insurance issued \* \* \* by a company that bears the name ‘mutual,’ but is not shown to have a lodge system with ritualistic form of work \* \* \* does not make the policyholder a member liable to assessment. \* \* \* ”

UNLESS THE LAWS OF THE INCORPORATING STATE PROVIDE THE CONTRARY IT IS ONE OF THE ATTRIBUTES OF MUTUAL INSURANCE THAT THE POLICYHOLDERS SHALL BE THE MEMBERS.

The rule is announced in **29 Am. Jur.**, “**Insurance**,” p. 88, Sec. 56:

“Generally speaking, the members of a mutual insurance company are its policyholders.”

And this principle has often been announced by this Court.

In **Hartford Steam Boiler Co. v. Harrison**, 301 U. S. 459, 464, this Court said:

“The policyholders are the owners of the company and constitute its membership.”

To the same effect is **Duffy v. Mutual Benefit Life Ins. Co.**, 272 U. S. 613, 71 L. ed. 439.

Recent state court decisions, premised upon pronouncements of this Court, are in accord with the contentions here advanced.

Lloyd, Supt., v. Cincinnati Checker Cab Co., ...  
Ohio ..., 36 N. E. (2) 67, *supra*;

Taggart, Ins. Commissioner, v. Wachter, Hoskins &  
Russell, Inc. (Maryland), 21 Atlantic Reporter  
(2) 141;

Pink, Supt., v. T. B. Aaron et al. (South Carolina),  
13 S. E. (2) 489;

Pink, Supt., v. Town Taxi Company, Inc. (Maine),  
21 Atlantic (2) 656 (decided August 11, 1941).

The last two cases dealt with the same assessment that is involved in this case. In each of these cases, as well as in the Maryland case, we have examined the briefs filed by the insured persons and we find citation and strong reliance upon the decision of the Supreme Court of Georgia here under review. It will be noted, however,

that these courts of review not only declined to consider the Georgia case as a persuasive authority, but they did not even cite it.

In measuring the liability of the respondents the Georgia Supreme Court [R. 82 (4)] said:

“If liable at all, the defendants are so only because their contracts constituted them members of the corporation. Whether or not these made them personally liable for the assessments **will be determined by the law of this State** when such liability is asserted against them in the courts of this State.” (Emphasis ours.)

In determining this question the Supreme Court of Georgia confined its inquiry of liability to the insurance policies themselves (R. 93-95), totally ignoring the mutual nature of the company and the liability arising therefrom. It said (R. 93):

“This involves a proper construction of the contract; that is, what is its legal import? In ascertaining this, the law of what state shall be applied?”

The Court concluded that the laws of Georgia should be applied (R. 94).

A comparison of the reasoning which led the Supreme Court of Georgia to the conclusion announced with the reasoning of the Supreme Court of Missouri in **Bolin v. Sovereign Camp W. O. W.**, 112 S. W. (2) 582, demonstrates quite<sup>4</sup> clearly that the Supreme Court of Georgia delib-

<sup>4</sup> That the Supreme Court of Georgia intentionally bottomed its opinion upon the doctrine repudiated by this Court in the **Green case** and the **Bolin case**, supra, clearly appears from its citation of **McClement v. Supreme Court, I. O. F.**, 152 N. Y. S. 136, and **Lee v. Missouri State Life Ins. Co.**, 238 S. W. 858, as authority for its position. These cases were overruled by name. The Court of Appeals of New York reversed the **McClement case** (222 N. Y. 470, 119 N. E. 99) on the authority of **Royri Arcanum v. Green**, and the Supreme Court of Missouri reversed the **Lee case** upon the same principle (1. cit. 261 S. W. 85), holding:

“The persuasive fact is evident that this association was created to conduct a life insurance business on the assessment plan. It was incorporated under a statute limited by its terms to insurance of that character. \* \* \* It is not material that the word ‘assessment’ was not used in the certificate.”

erately selected as the applicable rule the principles overruled by this Court in the **Bolin case**. Short citations make this clear.

In the **Bolin case**, *supra*, the Supreme Court of Missouri (112 S. W. [2] 582, at ...) said:

“The certificate must be regarded as a contract of general or old line insurance. This conclusion is not altered by the nature of the society granting the insurance because of the character of the insurance, so far as Missouri is concerned, depends on the terms of the contract only. Whatever may be the character of the petitioner in the eye of the Nebraska law it need not have the same character in Missouri. Whether it is a fraternal beneficiary society when sued in Missouri is a question of local law.”<sup>5</sup>

But the Georgia Supreme Court was no more at liberty to depart from the principles established in **Royal Arcanum v. Green**, *supra*, than was the Missouri Court, and in reversing the Missouri Court’s ruling in the **Bolin case** this Court [305 U. S. 66, 1. cit. 75 (2)] said:

“The beneficiary certificate (here a contract of mutual insurance) was not a mere contract to be construed and enforced according to the laws of the state where it was delivered. Entry into membership of an incorporated beneficiary society (mutual association) is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation. Another state, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile.”

And as this Court concluded (1. cit. 78):

“The court below was not at liberty to disregard the fundamental law of the petitioner and turn a mem-

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<sup>5</sup> Quoted from the opinion of this Court in **Sovereign Camp W. O. W. v. Bolin**, 305 U. S. 66, 1. cit. 74.

bership beneficiary certificate (mutual insurance policy) into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of ultra vires contracts (law of the forum) was to be applied as if the petitioner were a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of such associations are governed by the definition of the society's powers by the courts of its domicile."

Reduced to its last analysis, the decision of the Supreme Court of Georgia rests on the theory that the policy of insurance contains no provision for assessment and plaintiff has pleaded no other promise of the defendants to be liable for such assessment (R. 966). We will examine these conclusions in their order.

The failure to include in the contract an agreement assuming the assessment would surely not be more binding than a direct agreement relieving the stockholder or policyholder from assessment. It has long been established in this Court that when insolvency has ensued and the rights of creditors have intervened, **any agreement relieving the member from liability is void.**

In **Sanger v. Upton**, 91 U. S. 56, 23 L. ed. 220, this Court said:

"It may, perhaps, be well doubted whether the stockholders would have voluntarily imposed such a burden upon themselves. The law does not permit the rights of creditors to be subjected to such a test. It would be contrary to the plainest principles of reason and justice, to make payment by the debtor for such a purpose in anywise dependent upon his own choice. \* \* \*"

It is true that the Court there was dealing with the capital stock of an incorporated insurance company, but



the liability to assessment is the substitute for the capital stock.

Among the cases cited as authority in the **Sanger case** is **Salmon v. Hamborough Co.**, decided by an English Court in 1670. There an association of cloth merchants, operating under a charter which contained provisions for the assessment upon the cloth dealt with, faced the necessity of raising additional funds with which to pay an outstanding debt. The Chancellor sustained the charter power of assessment and directed the collection of the necessary funds.

THE PRINCIPLE OF LIABILITY TO ASSESSMENT  
ARISING FROM CHARTER PROVISIONS IS EQUALLY  
APPLICABLE TO MUTUAL INSURANCE ASSOCIA-  
TIONS.

“While the rule may have been applied more often in actions against stockholders where double liability, for instance, is sought and in actions against members of fraternal benefit companies, we see no controlling distinction between those cases and one, as here, to recover an assessment against a member of a mutual company. 48 A. L. R. 674 et seq.”

**Pink, Supt., v. Town Taxi Company, Inc.**, 21 Atl.  
(2) 656 (Decided Aug. 11, 1941);

**Lloyd, Supt., v. Cincinnati Checker Cab Co.**, supra,  
36 N. E. (2) 67.

The cases decided by this Court, supporting this principle, are not confined to such fraternal order cases as the **Green case** and the **Bolin case**, supra. **Marin v. Augedahl**, 247 U. S. 142, 62 L. ed. 1038, involved stockholders of a baking company. **Great Western Telegraph Co. v. Purdy**, 162 U. S. 329, 40 L. ed. 986, involved a telegraph corporation. **Broderick v. Rosner**, 294 U. S. 629, 79 L. ed. 1100, involved a banking company, and the various actions in

which **Converse** was a party involved a farm equipment company. (See **Berhneimer v. Converse**, 206 U. S. 516, and other cases arising out of the same receivership, cited in *Marin v. Augedahl*, *supra*, 1. cit. 247 U. S. 146.)

Indeed this Court, in the *Green* case, *supra* (1. cit. 542-543), points out that while the decisions of the state courts ruling the propositions for which we have been contending have been announced in cases involving fraternal associations (1. cit. 543), this Court finds that the principles announced by the state courts "come at last to the principle so admirably stated by Chief Justice Marshall in *Head v. Providence Insurance Company*, 2 Cranch. 127," and while adopting the principles above discussed in the **Green** case, which was itself a fraternal order case, the Court points out that "in addition it was by the application of the same principles that a line of decisions in this court came to establish \* \* \* the applicability of the law of the domicile to assessment provisions and the force and effect of the judgments rendered in these courts." Citing cases involving corporations other than fraternal orders cited in the preceding paragraph.

The decision of the Georgia Supreme Court marks the only departure from the general rule. In **Restatement, Conflict of Laws**, Section 206, the rule is announced:

"The existence and extent of the liability of a shareholder for assessments or to contribute to the corporation for the payment of debts of the corporation is determined by the law of the state of incorporation."

From the earliest decisions of this Court up to the present day this principle has prevailed. In **United States ex rel. Von Hoffman v. Quincy**, 4 Wall. 535, 550, 18 L. ed. 403, 408, this Court held that "the laws which subsist at the time and place of the making of a contract \* \* \* enter into and form a part of it as if they were expressly re-

ferred to or incorporated in its terms.” The statutes of New York placing mandatory liability therefore became incorporated in the relationship between the insured and the mutual association.

While the origin of the liability is statutory, the liability is contractual, arising out of the statute. **Hathorn v. Calef**, 2 Wall. 10, 17 L. ed. 776; **Whitman v. National Bank**, 176 U. S. 559, 563, 44 L. ed. 587. And being contractual it is entitled to the constitutional guaranty against the impairment of contracts.

Excellent discussions of this principle by the State courts will be found in **Russell v. Berry**, 51 Mich. 287, 16 N. W. 651; **Commonwealth ex rel. Schnader v. Keystone Indemnity Company** (Penna.), 11 Atl. (2) 887, and **Taggart, Insurance Commissioner, v. Wachter, Hoskins & Russell, Inc.**, 21 Atl. (2) 141, decided July 15, 1941, the two cases last cited involving mutual insurance associations.

**Chandler v. Peketz**, 297 U. S. 609, is to the same effect, but as it deals more specifically with the binding quality of the order of assessment it will be discussed in a subsequent portion of this brief.

#### THE LAWS OF NEW YORK, UNDER WHICH THE COMPANY WAS CHARTERED, IMPOSE A CONTINGENT LIABILITY ON ALL POLICYHOLDERS.

The relevant laws of New York, set forth in the pleadings (R. 23) and admitted by demurrer, are as follows:

“b. It is the law of New York that the aforesaid section 346 compels the company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed in accordance with section 346 of the New York insurance law.

“c. It is the law of New York that every person who was a member of a mutual insurance company at any time within the twelve months prior to the date of the commencement of the rehabilitation or liquidation proceedings against the company is liable to assessment in accordance with section 346 of the New York insurance law.

“d. It is the law of New York that the laws of that State govern the rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that State.”

By law and usage in the courts of New York the mandatory provisions of these statutes have been uniformly sustained.<sup>1</sup>

“Mutual automobile liability insurance companies of this State (New York) must issue assessable policies in every state in which they transact business.”

**Factory Mutual Liability Ins. Co. v. Behan, Acting Supt. of Insurance**, 253 N. Y. S. 562, 564.

Other states which, by their charters, are authorized to issue nonassessable policies upon the maintenance of fixed guaranty fund, “confine its (their) New York business to the issuance of assessable policies only.”

**Factory Mutual v. Behan**, *supra*.

In **Beha v. Weinstock**, 247 N. Y. 221, 160 N. E. 17, the highest court of New York, in dealing with an assessment of the identical nature here involved, said:

“ \* \* \* The defendant knew, when he entered the mutual company, that assessments could be levied up to twice his premium for the purpose of paying the losses. To the extent of this superadded liability, he became an insurer. \* \* \* The main thing is that the debts and liabilities are fixed as of a certain date and **a policyholder made liable by the statute for these debts up to a certain amount.**” (Emphasis ours.)

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<sup>1</sup> Statutory restrictions prohibiting non-assessable policies followed the company “into every jurisdiction where it undertook to contract.” **Silosberg v. New York Ins. Co.**, 155 N. E. 748, 753.

A change in the insurance laws of New York was necessary before mutual casualty companies possessed the corporate power to issue non-assessable policies and this will not become effective until June 15, 1942. (Chap. 28, Consolidated Laws, Sec. 58), adopted June 15, 1939.

In the report of the Referee in the domiciliary case (In re Auto Mutual Indemnity Company, 14 N. Y. S. [2] 601, Exhibit A to brief of petitioner in certiorari, filed in this court) a full discussion of this subject will be found.

By their demurrers the respondents admitted the provisions of the New York law aforesaid. The pleadings clearly alleged the integration of the New York laws in the policies of the respondents, and under the laws of Georgia the demurrer admits all properly pleaded allegations.

**Code of Georgia 1933, Section 81-304**, provides:

“A demurrer denies the right to the relief sought, in whole or in part, admitting all properly pleaded allegations in the petition to be true.”

Under the laws of New York the **power of the Company to issue insurance at all was limited to the issuance of assessable policies**. In determining its powers elsewhere resort must be had to the incorporating act.

**Head & Amory v. The Providence Ins. Co.**, 2 Cranch 127,

cited in **Royal Arcanum v. Green**, supra (page 16, this brief).

**CONSENT IS NOT NECESSARY TO CREATE LIABILITY ARISING OUT OF THE STATUTE.**

The Supreme Court of Georgia relieved its residents from liability by holding (R. 90):

“A person cannot be made a member or stockholder of a corporation without his consent.”

As we have previously asserted in this brief, this consent need not be evidenced by a direct agreement. It may arise from the conduct of the defendant in accepting stock in a banking corporation, or a policy in a mutual insurance company.

In **Howarth v. Lombard**, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, cited with approval by this Court in **Bernheimer v. Converse**, 206 U. S. 615, 51 L. Ed. 1163, the Massachusetts Supreme Judicial Court made an excellent analysis of the principles underlying this liability. This was an action by the Receiver of a bank incorporated in the state of Washington, against persons residing in Massachusetts. That Court, in determining the basis upon which rests this liability, said:

“It is not the statute which directly and proximately creates the liability. It is the voluntary action of the stockholders under the statute, followed by action of creditors which is founded on the action of the stockholders. \* \* \* The stockholders subscribed for their stock with full knowledge of the statute, and they must be held impliedly to have agreed to be bound by it. The statute enters into and forms a part of their undertaking as stockholders, and their implied agreements in that relation conform to it. It is to be noticed, under this statute, that stockholders, merely by subscribing for stock, **without any express promise to pay for it**, are bound, in all corporations to pay the amount of their unpaid subscriptions, if needed, and in banking corporations to pay as much more, if it is called for, to satisfy creditors \* \* \*.

“Although the liability is founded on a statute, there is a contractual element entering into it. **The undertaking is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions** to the corporation when needed, and should pay the additional sum to create a fund for creditors if the corporation should become insolvent, and a receiver should be appointed to collect it. \* \* \* such an obligation is quasi ex contractu.” (Emphasis Ours.)

And that Court, citing **Concord First National Bank v.**



**Hawkins**, 174 U. S. 364, 372, 43 L. ed. 1007-1011, 19 Supreme Court Reporter 742, where Mr. Justice Shiras says:

“Undoubtedly the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But, **as the ownership of the stock in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.**”

That such an obligation cannot be discharged by agreement nor impaired by statute clearly appears from the other authorities cited in **Howarth v. Lombard**, *supra*.

The Courts of New York have uniformly followed this rule. An excellent discussion appears in the report of the Referee (Exhibit “A” to brief filed with petition for certiorari).

THE LIABILITY TO ASSESSMENT, AS DETERMINED BY THE LAW OF THE DOMICILE, MUST BE ENFORCED THOUGH THE LAWS OF THE FORUM WOULD MAKE THE CONTRACT VOID. We quote briefly from the leading cases:

In **Christopher v. Norvell**, 201 U. S. 216, 50 L. Ed. 732, this Court said:

“The right to be a stockholder is given her by the law of the state where she resides and her *right and liability* as such are provided by the acts of Congress.” (Italics by the court.)

And in **Smathers v. Bank**, 71 S. E., at 346, the Court said:

“This liability is not contractual on the part of the stockholder, but is statutory and imposed for the benefit of creditors, and hence a married woman, when she becomes the owner of the stock, assumes the same liability as all other stockholders.”



In **Beha v. Weinstock**, *supra* (247 N. Y. 221), 160 N. E. 17, at 18, the Court of Appeals of New York was dealing with an assessment against members of a mutual casualty insurance company. It said:

“This was a mutual insurance company in which the insured was also the insurer. The only funds to pay insurance losses came from the premiums or assessments. Persons other than the insured were interested in maintaining a sufficient insurance fund to pay losses. By section 109 of the Insurance Law the company was directly liable in case of the insolvency of the insured to persons injured in an accident covered by the policy.

“Section 346 provided for a fund to pay losses. First, there was the premium stated in the policy. Then the contingent mutual liability of the members for the payment of losses in excess of its cash funds was provided by assessments, not to be less than an amount equal to twice the amount of, and in addition to, the cash premium written in the policy. \* \* \* The defendant knew, when he entered the mutual company, that assessments could be levied up to twice his premium for the purpose of paying losses. To the extent of this superadded liability, he became an insurer. \* \* \* The main thing is that the debts and liabilities are fixed as of a certain date and **a policyholder made liable by the statute for these debts** up to a certain amount.” (Emphasis ours.)

UNDER THE LAWS OF NEW YORK THE CONTINGENT LIABILITY OF STOCKHOLDERS (POLICY-HOLDERS) IS PROPERTY IN WHICH CREDITORS HAVE A VESTED RIGHT.

**Corning v. McCullough**, 1 Comstock 47, 49 Am. Dec. 287, 290.

The liability imposed in the **Corning case** is in many respects identical to the liability here involved. Speaking of the liability of the stockholders to contribute a sufficient

fund to pay corporate debts the Court of Appeals of New York said (l. cit. 49 Am. Dec. 291):

“This liability the stockholders voluntarily assumed, and it could not have been misunderstood by them. It is fully and clearly expressed in the act of incorporation. \* \* \* It is a liability which every stockholder must be understood to assume and take upon himself and to be under to those who deal with the company. Dealers contract with the corporation on the faith of that security for the performance of the contract. The credit they give is given, and they trust, as well **to the personal liability of the stockholders**, as to the responsibility of the corporation, for the fulfillment of the engagement; and each stockholder incurs that liability to the creditor the moment the contract of such creditor with the company is consummated.” (Emphasis ours.)

Further, at 294, the Court said:

“It is virtually and in effect a liability upon a contract, and the mutual agreement of the parties; not indeed in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties.

“The personal liability of the stockholders \* \* \* was one of the terms of purchase authorized by the statute. \* \* \* It was consequently one of the terms of the sale by the plaintiff (creditors) to the company and constituted part of their security for \* \* \* the debt. To those terms and security \* \* \* the stockholder \* \* \* gave his assent and made himself a party under and according to the provisions of the charter and the plaintiffs (creditors) \* \* \* entitled themselves to the benefit of the personal liability of the defendant as a stockholder.”

That policyholders in mutual companies have knowledge of its by-laws has long been the rule in this court.

In **Mutual Assurance Co. v. Korn**, 7 Cranch. 396, 3 L. ed. 383, this court said:

“One insured in a mutual company becomes a member thereof and is presumed to have knowledge of and is bound by the provisions of the charter, by-laws and rules of the company.”

And this has been the established rule in New York for many years.

Those who contract with corporations of this kind do so “with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation.” **People v. Globe Mutual Life Ins. Co.**, 91 N. Y. 174, 179; **People v. Security Life Ins. & Annuity Co.**, 78 N. Y. 115, 34 Am. Rep. 522, cited by the Court of Appeals of New York in **People v. American Loan & Trust Company**, 172 N. Y. 31, 65 N. E. 200.

And this knowledge is not confined to residents of New York. All policyholders become members of the Company and their status as policyholders is in New York.

“It does not matter that a member joined in another state.”

**Modern Woodmen v. Mixer**, 267 U. S. 544, at 551.

In **Canada Southern Railroad Co. v. Gebhard**, 109 U. S. 527 (l. cit. 537), this Court said:

“A corporation ‘must dwell in the place of its creation, and cannot migrate to another sovereignty’ (**Bank of Augusta v. Earle**, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. **Railroad v. Koontz**, 104 U. S. 12. But, wherever it goes for business it carries its charter, as that is the law of its existence (**Relfe v. Rundle**, 103 U. S. 226), and the charter is the same abroad that it is at home. \* \* \* whatever legislative control it is subjected to at home must be

recognized and submitted to by those who deal with it elsewhere. \* \* \* if admitted, it must, \* \* \* be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

By becoming insured in a mutual company each policyholder "created against himself a contractual liability in the nature of a suretyship. \* \* \* Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (*Ettor v. Tacoma*, 228 U. S. 148, 57 L. ed. 773, 33 S. Ct. 428, and cases cited in connection therewith, *supra*) that, upon the facts here disclosed, **a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. I, Sec. 10, and the due process of law clause in the Fourteenth Amendment, of the federal constitution.**" *Coombes v. Getz*, 285 U. S. 434, 448, 76 L. ed. 866, 875.

Such a liability could not have been avoided by contract. In *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, this Court held:

"A contract between a company or its agents and the stockholders, limiting their liability as to unpaid installments of stock, is void as to creditors of the company, and as to the rights of the assignee who represents the creditors."

MANY OF THE DEFENDANTS, BEING PUBLIC CARRIERS, INCURRED LIABILITY TO THE PUBLIC BY FILING POLICIES ISSUED BY THE COMPANY WITH THE INTERSTATE COMMERCE COMMISSION AND VARIOUS PUBLIC SERVICE COMMISSIONS.

These requirements are set forth in detail in **Blashfield's Automobile Laws**, Vol. 1, p. 131, and were recently sustained by this Court.

**Merchants Mutual Ins. Co. v. Smart**, 267 U. S. 129, 69 L. ed. 542.

The assessments which petitioner seeks to collect will in a large part be paid to members of the public who have rights arising from the filing of these policies with the various public service commissions. The rights of persons entitled to protection by these provisions of law are absolute. Whatever defenses might be available between the policyholder and the company, if the rights of creditors were not present, is not material. We are now dealing with the action brought by a liquidator to collect the funds with which he may pay claims of creditors. **As against claims of this nature all policyholders, including the Georgia defendants, are estopped to deny liability provided for by law.**

Where the claims arise from property destroyed or injuries received in intrastate or interstate commerce the estoppel is clear.

**United States Casualty Co. v. Timmerman**, 180 Atl. 631;

**McLaughlin v. Central Surety & Ins. Corp.**, 166 Atl. 621.

In **Bolta Rubber Co. v. Lowell Trucking Corp.**, 25 N. E. (2) 973 (certiorari denied), the Court, dealing with the recent requirement of the Interstate Commerce Commission, held:

“The violation by truckers of requirement in policy  
• • • would not preclude shipper from enforcing for  
its own benefit the obligation of insurer to the extent  
of \$1,000 under indorsement added to policy pursuant  
to regulations of Interstate Commerce Commission. 45  
U. S. C. A., Sec. 315.”

**PROVISIONS OF INSURANCE LAW MADE MANDATORY BY STATUTORY REQUIREMENT ARE READ INTO THE POLICIES IF OMITTED.**

The public has a right of action against the company under the terms of the policy “in the same manner and to the same extent as the insured” (conditions of policy, Sec. 6, R. 48).

“When the contract of insurance is made and the policy is issued it is made in contemplation of this law, which immediately becomes part of it. If this be not so, the door is open for fraud, subterfuge and deception. The insurance company may refuse the risk, refuse to issue its policy, but, once having done so, section 109 attaches to it, and the mere failure to recite this provision in the policy will not obviate its effect. If this be so, it stands to reason that no agreement between the insurance company and the insured can modify the law. The purpose of the provision is apparent. It is made for the benefit of persons injured or suffering damage and not solely for the benefit of the insured. • • •.”

**Bakker v. Aetna Life Ins. Co.**, 264 N. Y. 150, 190 N. E. 327.

In **Newton v. Employers' Liability Assurance Corporation**, 107 Fed. (2) 164, the Fourth Circuit Court of Appeals, examining the statutes of New York placing specific burdens against casualty companies, at page 167, says:

“It puts an end to the rule that a contract of liability insurance is to be regarded as one of indemnity only. • • • When the owner takes out a liability

policy, no matter how limited as to coverage, the provisions of section 109 are a part of the contract.”

Quoting from **Bakker v. Aetna Life Ins. Co.**, *supra*, the court says:

“The owner is not obliged to insure in all instances, nor is any insurance company obliged to issue a policy to everybody making application, but, **when the policy is once issued** and the risk assumed, **section 109 of the Insurance law states specifically what this risk shall be.**”

In **National Union Fire Ins. Co. v. Wanberg**, 260 U. S. 71, 67 L. ed. 136-149, the Court considered a provision in the application for insurance contrary to the terms of the statute and disposed of it as follows:

“It is clear that, **if the statute is valid, such a consent is void**, because it defeats the very object of the statute.”

And in **Merchants Mutual Ins. Co. v. Smart**, *supra*, 267 U. S. 129, 69 L. ed. 538 (1), the Court held:

“A state authorizing an insurance company to do business within its limits, may regulate its affairs, so far, at least, as to prevent it from committing wrongs or injustice in the exercise of its corporate functions.”

Nor may the respondents escape liability because their policies contained no reference to assessment. As previously pointed out, such exemption from liability would not have been available had there been a direct agreement to that effect. Their rights are not impaired by the integration of the statute into their contracts; they were notified through the insurance provisions of the statutes of New York, of what would be required of them if they did business with a mutual company, and by accepting insurance from the company they assented to these terms.

**Fire Association of Philadelphia v. New York**, 119 U. S. 110, 30 L. ed. 342.



This is in accordance with the principles announced generally by the state courts and by this court. Some of the authorities will be noticed briefly.

In **Lorando v. Gethro**, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374, the Court holds that a statute providing that indemnity insurance policies shall not require payment of the loss by the insured as a condition to liability of the insurer, and that the injured person may look to the insurer for compensation, becomes a part of every insurance policy written in the state and the provisions in the contract to the contrary are void.

In **Cogliano v. Ferguson**, 139 N. E. Reporter 527, the same principle is recognized as follows:

“The contract having been made with a foreign corporation, among its implied terms were the provisions of the statute under which it was organized, and could be dissolved, and its assets distributed among creditors.”

There the court cites **Howarth v. Lombard**, *supra*, frequently cited in our briefs; **Bernheimer v. Converse**, *supra*, and **In re Empire State Surety Co.**, 214 N. Y. 553, 108 N. E. 825.

An excellent collection of the authorities will be found in **Southern Surety Co. v. Chambers**, 115 Ohio St. Rep. 434, 154 N. E. 786, 787.

The effect of the decision of the Court below was to deny to the records and judicial proceedings of New York such faith and credit “as they have by law or usage” in the courts of the state from which they are taken. There was a failure to extend to petitioner the protection to which he was entitled under Section 1, Article IV, of the Constitution of the United States, and the judgment must be reversed.

THE JUDGMENT DISMISSING THE CASE DEPRIVED PETITIONER OF THE RIGHT TO COLLECT PREMIUMS ADMITTEDLY DUE.

The court below gave no reason for this action. Believing that the court had overlooked these claims petitioner promptly filed his motion for rehearing [R. 98 (3)], in which he called attention to this oversight. The motion for rehearing was denied in its entirety without opinion, thereby relieving the defendants from admitted indebtedness.

This decision could not turn on the question of Georgia procedure. In the motion for rehearing, *supra*, the attention of the court was directed to **Globe & Rutgers v. Salvation Army**, 177 Ga. 890, 898, ruling the identical point in petitioner's favor. It must follow that the court denied recovery either upon the theory that the right to recover these premiums was not in petitioner, or that the failure to include the assessment provision in the policy was destructive of all the rights of petitioner. We will examine these grounds in their order.

(1) The collection of unpaid premiums was the duty of the liquidator. The statutes of New York provide:

"The Superintendent \* \* \* shall be vested by operation of law with the title to all of the property, contracts and rights of action of such insurer as of the date of the order so directing them to liquidate. \* \* \*"

Insurance Laws of New York, Sec. 404 (2).

The insurance laws of New York governing the liquidation of insolvent insurance companies specifically provide for the collection of premium balances in the liquidation proceedings in which the assessments are dealt with (Sec. 423, R. 30).

§ 423. Determination of Liability of Members for Other Indebtedness. If it shall appear that a member of a domestic mutual insurer is indebted to such insurer, apart from his liability to assessment, the court may, upon the application of the superintendent, in any order under section four hundred and twenty-two of this chapter directing such member to show cause why he should not be held liable to pay an assessment, likewise direct him to show cause why he should not be held liable to pay such indebtedness. And the liability of such member for such other indebtedness shall be determined in the same manner, and at the same time, that his liability for such assessment is determined, and the superintendent may likewise have judgment therefor, but without any additional costs.

Being a statutory liquidator, the courts of Georgia could not be closed to petitioner.

**O'Malley, Supt., v. Wilson**, 182 Ga. 97, 185 S. E. 109;

**Relfe v. Rundle**, 103 U. S. 222, 26 L. ed. 337;

**Clark v. Williard**, 292 U. S. 112, 129, 78 L. ed. 1160, 1170;

**Broderick v. Rosner**, 294 U. S. 629, 79 L. ed. 1100.

Having clearly demonstrated that petitioner established his right to recover premium balances from some of the respondents, it follows that a denial of this right not only destroyed rights guaranteed him by the contract clause (Article 1, Section 10), but it also deprived him of property without due process of law and was a clear discrimination against a citizen of New York.

**Coombes v. Getz**, *supra*, 285 U. S. 434, 76 L. ed. 866, where it was held (l. cit. 441):

“The decision of the supreme court of a state construing and applying its own constitution and laws generally is binding upon this court, but that is not

so where the contract clause of the Federal Constitution is involved. \* \* \*." This court "will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause."

The premiums were payable in New York and a construction by the Georgia court which destroys this obligation of the defendant to petitioner comes within the reviewing power of this Court.

### RESIDENTS OF GEORGIA WERE PARTIES TO THE NEW YORK LIQUIDATION PROCEEDINGS.

The Supreme Court of Georgia (R. 88, div. 3) held that Georgia defendants were not parties to the original proceedings, limiting this holding to the language, "we mean that they were not personally served, and that they have not had their day in court for the purpose of asserting their nonliability."

In another portion of the opinion (R. 90) it held that "it is of the essence of due process that one must be given an opportunity to be heard."

We assume that the court means an opportunity to be heard in the courts of Georgia. But this was not a privilege guaranteed to the respondents. The association which they joined could only be properly liquidated in the State of New York and they had ample opportunity to be heard there.

The petition alleges compliance with the statutory requirements of notice by publication and mail (R. 9), and the demurrers of the respondents admitted the truth of these allegations. The record discloses ample opportunity for appearance after notice of the proceedings had come to them. Though the assessments were confirmed (judgment of February 7, 1938, R. 35), the members were given sev-

eral additional extensions of time (R. 38), and they could have appeared at any time up to the filing of the Referee's report on September 8, 1935. It thus appears that a period of sixteen months elapsed from the time notice was given until the final judgment was made in the New York proceedings.

The finding that notice has been given to these members in accordance with the statutes "is reasonably calculated to give him (them) actual notice of the proceedings and an opportunity to be heard." Under such circumstances "the traditional notions of fair play and substantial justice \* \* \* implicit in due process are satisfied."

**Milliken v. Meyer**, No. 66, October Term, 1940, ...  
U. S. ..., 85 L. ed. 269, 273.

But even this opportunity was not necessary. Service on the corporation was service on the members in so far as the general question of liability to assessment is concerned, and the corporation did represent the members.

In **Bernheimer v. Converse**, *supra*, 206 U. S. 516 (l. cit. 532), this Court said:

"It is said that the stockholder is held liable in a proceeding to which he is not a party. \* \* \* The validity of such additional enactments depends not necessarily upon the personal service upon the stockholders, but upon the fact whether the remedy provided is a well-recognized means of enforcing such obligation, and not in violation of constitutional rights. It is true that the stockholder is not necessarily served with process \* \* \*, but no personal judgment is rendered against him in that proceeding, and it has reference to a corporation of which he is a member by virtue of his holding stock therein, and the proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered

for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to."

This principle is examined and approved in **Marin v. Augedahl**, *supra*, 247 U. S. 142, 62 L. ed. 1038.

In **Taggart, Ins. Commissioner, v. Wachter, Hoskins & Russell, Inc.**, 21 Atlantic Reporter (2) 141, 147 (Advance Sheets, August 16, 1941), the Court of Appeals of Maryland, in sustaining an assessment which had been approved by the Pennsylvania courts in a proceeding to which the Maryland policyholders were not parties, said:

"A subscriber knew that it was essential to the plan of the organization which he was entering that uniformity of relationship, rights and obligations be maintained from the beginning through to dissolution and final contingent assessment, and he must be taken to have accepted as an essential condition of his membership that all steps required to accomplish the uniformity, all that affected subscribers as a whole, should be taken by the one authority. \* \* \*"

Quoting from **Howarth v. Lombard**, *supra*, 175 Mass. 570, the court, at page 149, held further:

"The ascertainment is like a common case of a judgment against a corporation, which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. The assessment was 'in principle, like the assessments made by the court upon the members of insolvent mutual fire insurance companies under the laws of this commonwealth which are binding upon the members to whom no actual notice is given.'"

The statutes of New York, fully set out in the pleadings

(R. 28), provide the method of levying these assessments and of giving notice to the policyholders by mail and by publication. Such procedure is in every respect equal to the requirements of the Minnesota legislation frequently before this Court.

In an assessment case recently decided, **Chandler v. Peketz**, 297 U. S. 609, 80 L. ed. 881, this Court (l. cit. 610-611) held:

“We have held that the Minnesota provisions constituted a reasonable regulation for enforcing the liability assumed by those who became stockholders in corporations organized under the laws of that State; that the order levying the assessment is made conclusive \* \* \*: that it is thus conclusive, although the stockholder may not have been a party to the suit in which it was made or notified that an assessment was contemplated.”

Clearly, the Georgia residents were parties to the New York proceedings. They were bound by the judgments entered as to all matters common to policyholders as a class. Personal defenses remained open to them, and these respondents may yet assert these personal defenses, if any they have, in their answers in the trial court when this case is reversed and remanded. What are personal defenses have often been defined by this Court.

In **Great Western Telegraph Co. v. Purdy**, 162 U. S. 329 (cited by the Supreme Court of Georgia, R. 90), this court said:

“\* \* \* he had the right to plead a release, or payment, or the statute of limitations, or any other defense, going to show that he was not liable upon his contract of subscription.”

But, of course, personal defenses do not include a denial of the very right from which liability springs, to wit, the applicability of the New York law. That right cannot be



denied by any state, whether based upon its decisions or upon its public policy.

**Broderick v. Rosner**, *supra*, 294 U. S. 629.

In **John Hancock Mutual Life Ins. Co. v. Yates**, 299 U. S. 178, 81 L. ed. 106, this court reviewed a decision of the Supreme Court of Georgia (182 Ga. 213) in which substantive rights of the insurance company, integrated in the policy by force of the statute, were denied force and effect on the theory that to do so would give extraterritorial effect to the New York statute.

In reversing the decision of the Georgia court this court pointed out **that the statutes of New York**, as construed by the highest courts of that state, **made the provisions relied on a part of the contract**, and ruled that the full faith and credit clause of the Federal Constitution did compel the application by Georgia of the New York statutes.

Similar reasoning by the Supreme Court of Georgia in the case under review should be reversed on the same grounds. It is significant that this Court, in deciding the **John Hancock case**, *supra*, cited as one of the applicable authorities **Modern Woodmen v. Mixer**, *supra*, 267 U. S. 544, thereby recognizing that cases involving associations having a ritualistic form of government are equally applicable to other insurance contracts.

THE JUDGMENTS ENTERED IN THE NEW YORK PROCEEDINGS WERE DENIED FULL FAITH AND CREDIT.

The scope of the judgments entered in the domiciliary proceedings will now be examined. That Court approved

(a) the 40 per cent assessment recommended by the Liquidator (Judgment of February 7, 1938, R. 34-5);

(b) the computation disclosing the amount due by each

policyholder arising from the assessment, and for other indebtedness due (Judgment entered August 11, 1938, R. 35);

(c) order and judgment finding sufficient proof of service by publication and notice by mail to each member (Judgment entered November 17, 1938, R. 38-40);

(d) the report filed by the Liquidator (Judgment of November 17, 1938, R. 38-40), including a consideration of the type of policies held by the Georgia defendants and a finding that all policyholders of this class were subject to assessment.<sup>6</sup>

(e) The judgment of the Referee, appointed to hear and determine the case (*In re Auto Mutual Indemnity Company*, 14 N. Y. Supp. [2] 601), ruling upon and denying every claim asserted by the respondents herein.

That the judgments approving the assessments are binding upon all members, irrespective of their residence, cannot be questioned.

In **Broderick v. Rosner**, *supra*, 294 U. S. 629, 79 L. ed. 1100, this Court considered the liability of New Jersey residents to assessments as stockholders of a Bank, chartered in New York, and said (l. cit. 643):

“The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. \* \* \* The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause. **If the assessment had been made in a liquidation proceeding conducted by a court, New Jersey (Georgia) would have been obliged to enforce**

<sup>6</sup> The policy appears in the record (R. 47) and the pleadings allege [R. 21 (8) and R. 10] that this type of policy was before the Court when the assessments were approved.

it, although the stockholders sued had not been made parties to the proceedings, and being nonresidents, could not have been personally served with process.

\* \* \* The reason why in that case (*Converse v. Hamilton*, supra) the full faith and credit clause was held to require Wisconsin courts to enforce the assessment made in Minnesota was not because the determination was embodied in a judgment. Against the nonresident stockholders there had been no judgment in Minnesota. Wisconsin was required to enforce the Minnesota assessment because statutes are 'public acts' within the meaning of the clause, \* \* \* and because the residents of Wisconsin had, by becoming stockholders of a Minnesota corporation, submitted themselves to that extent, to the jurisdiction and laws of the latter state. Where a State has had jurisdiction of the subject matter and the parties, obligations validly imposed upon them by statute must, within the limitations above stated, be given full faith and credit by all the other States."

In **Chandler v. Peketz**, supra, 297 U. S. 609 (l. cit. 610), this Court held:

"\* \* \* the order levying the assessment is made conclusive."

And the judgment finding service perfected and determining that those persons holding policies of the type set forth were liable to assessment, is equally binding.

In **Marin v. Augedahl**, 247 U. S. 142, 62 L. ed. 1038 (l. cit. 149) this Court held:

"Charged with the duty, as the court was, of ascertaining whether there was any liability to be enforced, it was its province to consider and decide every question which was an element in that problem, including the one of whether the corporation was in the excepted class. That question required solution and the power to solve it was lodged in the court. The court did solve it, for, as is said in *Neff v. Lamm*, 99 Minn. 115, 117, 108 N. W. 849, the order making the assessment

is 'necessarily based upon a determination that the corporation is of the class whose stock is assessable, and not of the excepted class.' Whether the decision was right or wrong is not open to discussion here. \* \* \*.

"A judgment is conclusive as to all the media concludendi \* \* \*, and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law. \* \* \* Whether the stockholder against whom the order is here sought to be enforced was personally a party to the suit in which it was made does not appear; nor is it material. \* \* \* he was sufficiently represented by the corporation to be bound by the order in so far as it determined the character and insolvency of the corporation and other matters affecting the propriety of a general assessment such as was made."

"The decision of a referee appointed to hear and determine has the same effect as the decision of a justice of this (Supreme) Court."

**Kiernan v. Consolidated Gas and Gasoline Engine Co.**, 201 N. Y. Supp. 78.

"\* \* \* the only defenses which he can make against it are those which he could make in the courts of Kansas (New York)."

**Hancock National Bank v. Farnum**, *supra*, 176 U. S. 640, 644.

The Supreme Court of Georgia found a timely offer of petitioner to introduce at the trial of the case "the acts of the legislature of the State of New York, referred to in the petition, duly authenticated by the great seal of that State, and \* \* \* the records and judicial proceedings referred to, duly attested under the seal of the court, all as provided by section 38-627 of the Code of Georgia, and by the United States Revised Statutes, Section 905, title 28, section 687" (R. 87).

And further, that petitioner contended "that said public acts, judicial proceedings and records of the State of New York are entitled to and should receive full faith and credit in the courts of this State and in this proceeding, as is specifically provided in Section 38-627 of the Code of Georgia of 1933, and by article 4, section 1, of the constitution of the United States (Code, Sec. 1-401); and that any judgment which denies or has the effect of denying to the judgments and statutes aforesaid the full force and effect to which they are entitled under the constitution and laws aforesaid, abridges the privileges and immunities of petitioner as a citizen of the United States, contrary to the fourteenth amendment of the constitution of the United States" (R. 87).

It is, therefore, apparent that the rights arising out of the New York statute and New York proceedings were considered by the trial court along with the privileges asserted under the Constitution of the United States, and that these privileges were denied by the trial court and by the Supreme Court of Georgia. For their error in so doing, the case should be reversed and remanded with direction.

**EVEN IF LIABILITY BE MEASURED BY THE LAWS OF GEORGIA, DEFENDANTS WERE LIABLE.**

The court below ruled that the assessments, though properly declared and approved in New York, would not be enforced in the courts of Georgia at the instance of a citizen of New York because the policy contained in its face no provision for assessment. But a similar defense by Georgia residents was overruled by the Supreme Court of Georgia in **Alma Gin & Milling Co. v. Peebles**, 145 Ga. 722. There the Supreme Court of Georgia pointed out the distinction between the rights of the policyholder when he seeks to recover as an insured and his liabilities when he is sued as one of the insurers. There, as here, the cred-

itors sought to recover assessments under the provisions of the constitution and by-laws. We quote from the decision:

“Among the grounds of demurrer insisted upon in this court was the one based upon the failure of the company to attach to or incorporate in the policy a copy of the constitution and by-laws and application; and the demurrants insist that a failure to do this \* \* \* deprived the plaintiffs of the right to rely upon the stipulations \* \* \* or the provisions in the by-laws and constitution of the company, which obligated the policyholders to pay the assessments sought to be collected by this suit.”

The defense in the Alma Gin Company case was based upon the Act of 1906, which required that stipulations and by-laws be made part of the policy, otherwise they were unenforceable. In overruling this defense the Supreme Court of Georgia said:

“We agree with this contention of the defendants in error, that the act of 1906 is applicable in a case where suit is brought on a policy by the holder thereof against the company to establish the liability of the company to the insured, and to obtain a judgment in favor of the latter; but it is not applicable in a case like this, that is, of a suit to establish the liability of policyholders to pay assessments, and to compel them to contribute to the payment of losses sustained by another policyholder.”

From the above it is clear that the relief obtainable by a resident of Georgia was denied to petitioner. **Such discrimination against a resident of New York denied to him the equality due all citizens**, to which he was entitled under Article IV, Section 2, Paragraph 1, of the Constitution of the United States, **and also deprived him of property without due process of law** and the equal protection of the law, contrary to the provisions of the **Fourteenth Amendment**.

It may be insisted that a federal question of this kind arises only from the construction of an act and not from the erroneous decision of the Court. But the decision of the Supreme Court of Georgia construes its statutes (without naming them) and holds [R. 83 (5)] that under the insurance laws of Georgia the acceptance of a policy of insurance in a mutual company does not charge the policyholder with notice of the contingent liability provided for in the constitution and by-laws. But the general law of Georgia is to the contrary (R. 101).

Code of Georgia of 1933, **Section 56-1401**, provides:

“The contract of insurance is sometimes upon the idea of mutuality, by which each of the insured becomes one of the insurers, \* \* \* without a charter, such an organization would be governed by the general law of partnership; when incorporated, they are subject to the terms of their charters.”

“**Section 56-1403. By-laws become part of policy.** The rules and regulations of a mutual company, adopted in pursuance of the charter, become a part of each policy, and all the insured are presumed to have notice thereof. \* \* \*”

It follows that by the application of the laws of Georgia, the rules and regulations become part of the policy and were enforceable at the suit of a resident. To deny a similar privilege to a citizen of New York is a discrimination of the type referred to in the preceding paragraph.

## VII.

### CONCLUSION.

We conclude this brief as we began it. The appeal is controlled by the principles clearly enunciated by this Court in the leading cases heretofore mentioned.

Supreme Council of Royal Arcanum v. Green;



Sovereign Camp W. O. W. v. Bolin;  
Chandler v. Peketz,

and to which may be added

Broderick v. Rosner.

An examination of the principles there announced demonstrate clearly the injustice suffered by the petitioner in the court below, and that the judgment deprived him of the constitutional privileges asserted in his pleadings.

We have pointed out the principal errors underlying the decision of the Supreme Court of Georgia. For a critical analysis of the entire decision we respectfully refer the Court to our motion for rehearing, filed below (R. 96-107).

In comparing the errors pointed out in this motion with the opinion as it appears in the record, one difference will be noted. We asserted (R. 97) that the court was in error in its statement "the corporation was not a party" in the liquidation proceedings. When the decision was originally announced it was premised upon **this** statement of fact and supported by the citation of **Southworth v. Morgan**, 205 N. Y. 293, 98 N. E. 491 (R. 98), a case involving liquidation proceedings in a state other than the domicile of the corporation. The Supreme Court of Georgia **withdrew the erroneous statement of fact by revising its opinion** (R. 89), as it had a right to do under its own rules. But the error in the decision did not arise solely from the misstatement of fact, it arose from the application of the principles of law contained in **Southworth v. Morgan**. Entirely different principles of law control if the proceedings are in the domicile of the corporation, but the Supreme Court of Georgia did not examine these principles in the light of the facts truly stated. It adhered to its original opinion, arrived at from a misconception of the facts. As the law of the domi-

cile was entitled to full faith and credit under the constitutional provisions which we have discussed, the error in the decision below is clear.

The matters of public importance involved in this appeal have been fully stated in the petition for certiorari and in the brief supporting the same (pp. 26-27) and will not be repeated. As we there said, with full citation of authority, an assessment which is given one definition in one state and a different definition in another state is no assessment at all. It destroys the entire theory of mutuality.

Petitioner is charged with the specific duty of collecting assessments from the policyholders of this company, thereby creating a fund available to members of the public who may assert claims. But more than this, petitioner, as Superintendent of Insurance of the State of New York, has the duty of determining the solvency of these mutual casualty companies, incorporated in that state, and the fact of this qualification is accepted by the Motor Division of the Interstate Commerce Commission and various Public Service Commissions as evidence of the solvency of the qualifying companies.

Mutual insurance companies have no capital other than the contingent liability provided by statute. In 1939 the premiums collected by mutual companies, chartered in New York, approximated fifty million dollars. If the right of assessment conferred by the charter receives general recognition, then the contingent liability is twice this amount, a sum amply sufficient to provide reserves for any emergency. But if this assesment is not enforceable in some of the states in which the company did business, then this must be given consideration in determining the solvency of the company. If there is added to the loss of assessment

the burden of claims arising in states where the assessment is not collected,<sup>7</sup> a complicated and confused result follows.

Unless the validity of the assessment in every State in the Union is established by a judgment of this Court requiring recognition of the New York statutes and proceedings, the physical difficulty and the cost of recovering the assessments will render the proceedings futile. All claimants, whether policyholders or members of the public, will be left without remedy.

The business of insurance cannot be properly conducted if "divergent, variable and conflicting criteria" (*Royal Arcanum v. Green*, 237 U. S., at 542) arise in its operation in States other than the domicile. The judgment should be reversed.

Respectfully submitted,

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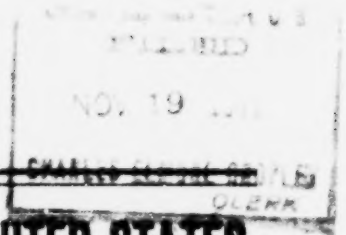
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---

<sup>7</sup> Many of the respondents in this case have filed large claims in the New York liquidation proceedings. Among them are the respondents who filed a brief in this Court in opposition to the grant of the certiorari. The public reports of the Superintendent, of file in the case, indicate claims filed by *Roy R. Raegin*, \$1,800.00; *Georgia Motor Express*, \$3,060.00; *Southeastern Stages*, \$8,596.00; and the decision in *Pink, Supt., v. Georgia Stages, Inc.*, 35 Fed. Supp. 437 (Finding of Fact 10<sup>1</sup>/<sub>2</sub>, 35 Fed. Supp. 441), discloses an allowance of \$12,502.00.

Georgia residents, while relieved of assessments, will participate in and diminish a fund available to other policyholders, who have paid their assessments.

**FILE COPY**



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**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1941.

No. 48.

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LOUIS H. PINK, Superintendent of Insurance of the  
State of New York,  
Petitioner,

v.

A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as  
ADAMS TRANSFER CO., H. L. BASS, as BASS  
BUS LINE, et al.,  
Respondents.

---

On Writ of Certiorari to the Supreme Court of the  
State of Georgia.

**REPLY BRIEF OF PETITIONER.**

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# **SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1941.**

**No. 48.**

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**LOUIS H. PINK, Superintendent of Insurance of the  
State of New York,  
Petitioner,**

**v.**

**A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as  
ADAMS TRANSFER CO., H. L. BASS, as BASS  
BUS LINE, et al.,  
Respondents.**

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**On Writ of Certiorari to the Supreme Court of the  
State of Georgia.**

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## **REPLY BRIEF OF PETITIONER.**

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The brief of respondents contains many misstatements of fact. Of the authorities cited, some have been specifically overruled by name, while others fail to support the legal propositions for which they are cited. Leave to file this reply brief is requested.

## **SUMMARY OF QUESTIONS INVOLVED IN THE RECORD.**

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### **I.**

#### **ALL RESPONDENTS ARE INSURERS.**

Respondents have not furnished a summary of the proceedings below and we must assume that they accept the summary set forth by petitioner. It is evident that re-

spondents have entirely overlooked or ignored the real basis of the controversy pending here (our brief, p. 3). The relationship between a policyholder and the association is two-fold; he is both insured and insurer. The contract of insurance indemnifies him against loss. If it was countersigned and delivered in Georgia, an action to recover for losses sustained would be determined by Georgia law, but there is another and second contract. **A policyholder by the acceptance of a policy becomes a member and an insurer.\* This contract of insurance protects all other policyholders, members of the public and the policyholder himself.<sup>1</sup>**

This contract of mutual insurance covers both profits and losses arising out of the relationship as insurers. The policy contains specific provisions for these profits [Photostat of Policy, R. 48 (a), paragraph 14]. The statutes of New York and the by-laws contain provisions for assessments covering losses. A member of a mutual company is a partner, with his liability limited by statute.<sup>2</sup>

The case brought by petitioner in the trial court is based entirely on the second relationship. An examination of

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\*A clear statement of this rule appears in *Hill v. Baker* (Mass.), 91 N. E. 380, at 381:

"Each member is at the same time insurer and insured. In one aspect he is a mere holder of a policy containing a contract of indemnity against loss by fire, with a specific and limited fund out of which that indemnity is to be made good. \* \* \* In another aspect he is a member of the corporation, made so by the very nature of the contract, and so declared by law. \* \* \* In this relation he is an insurer, and is affected by another and very different class of obligations."

<sup>1</sup> Indeed, the respondents represented by counsel who argue this case have filed large claims in the New York proceedings. They are Kaler Produce Company, Cox Brothers Undertakers, Atlanta Macon Motor Express, Inc., and Continental Carriers, Inc.

<sup>2</sup> " \* \* \* That is his contract, and the duty which the statute imposes, and that is his obligation. Any statute which took away the benefit of such contract or obligation would be void as to the creditor, \* \* \*."

*Bernheimer v. Converse*, 206 U. S. 516, at 530.

This rule prevails in New York, *Beha v. Weinstock*, 247 N. Y. 221, and it is the law of Georgia, Code of 1933, Sec. 56-1401 (Our Brief, p. 29).

the original petition and the amendment (R. 7 to 19) discloses that the policy was not sued on. The action is clearly based upon the liability arising from the statutes of New York and the judgments entered in the liquidation proceedings. Subsequently, and in answer to special demurrers which called for a copy of the policy, the policy was exhibited, but it was not sued on. It is merely evidence of the relationship which could have been proven otherwise.

**"THE RIGHTS OF MEMBERSHIP ARE GOVERNED BY THE LAWS OF THE STATE OF INCORPORATION."**

**Sovereign Camp W. O. W. v. Bolin**, 305 U. S. 66, 75 (our brief, p. 20).

## II.

### **THE SOLE QUESTION INVOLVED.**

(Respondents' Brief, Sec. 3, p. 6.)

Respondents, in the third section of their brief, set forth two questions, the answer to which they assert is of major importance. We agree with them. The determination of the questions, or the single question differently stated, lies at the foundation of the case. But respondents have "loaded" the questions by extraneous and untrue matter. We first adjust the questions to the record and then proceed to consider them.

Respondents say:

1. The sole and controlling question in the case is this: DID DEFENDANT POLICYHOLDERS, BY THE MERE ACCEPTANCE OF THE INSURANCE POLICY ISSUED TO THEM [exhibited in the Record, R. 41-43. Photo copy R. 48 (a)] KNOWINGLY AND VOLUNTARILY BECOME MEMBERS OF AUTO MUTUAL INDEMNITY COM-

PANY OF NEW YORK, SO AS TO BECOME LIABLE FOR THE ASSESSMENTS PROVIDED FOR BY THE STATUTES OF NEW YORK AND THE CHARTER AND BY-LAWS OF SAID COMPANY?

2. To put the question in another way: DOES THE STATUTE LAW OF NEW YORK ENTER INTO THE CONTRACT OF THE RESPONDENTS SO AS TO CREATE THE MEMBERSHIP RELATION WHICH UNDER THE NEW YORK LAW CARRIES WITH IT THE LIABILITY TO ASSESSMENT, OR MUST THAT RELATION BE FIRST CREATED BY THE CONVENTIONAL ACT OF THE PARTIES, WHEREUPON THE MEMBERS BECOME BOUND BY THE LAWS OF NEW YORK DEFINING THEIR LIABILITY?

Both questions must be answered in the affirmative. In our brief (pp. 18-22) we said, with ample citation of authority, **unless the laws of the incorporating state provide the contrary it is one of the attributes of mutual insurance that the policyholders shall be the members.**

Short quotations from the cited cases seem appropriate. In **Duffy v. Mutual Benefit Life Ins. Co.**, 272 U. S. 613 (our brief, p. 18), this Court, at page 616, said:

**"Respondent is a mutual company having no capital stock; and its policyholders constitute its members."** (Emphasis ours.)

And further, at page 619:

**"\* \* \* each member bears a relation to the mutual company analogous to that which a stockholder bears to the joint stock company."** (Emphasis ours.)

That there is a radical difference between mutual and stock companies is a matter of common knowledge. Speaking of it in the **Hartford case**, 301 U. S. 459 (our brief, p. 18), this Court, at page 463, said:

"It is idle to elaborate the differences between mutual and stock companies. These are manifest and admitted."

And at page 466:

"The principle of assessment upon which mutual companies proceed is practical only for carrying risks closely uniform in kind and degree."

More than fifty years ago the Supreme Court of Michigan clearly stated the controlling principle. In **Russell, Receiver, v. Berry**, 16 N. W. Reporter 651, at 652-653, it held:

"The law is now dealing with the company when it has become insolvent, and is being wound up in chancery. There is no capital stock. The means to pay losses and expenses, and also for services, must be obtained, if at all, by the levy of contributions in accordance with the vital principle of all such organizations. There can be no other resort \* \* \*."

"The obligation of the insured party is fundamental. It does not depend upon the form which may be given to his promissory 'undertaking.' It is a positive result of his connection with the company, and the principle which underlies it somewhat resembles that which underlies the liability to taxation. Responsibility is inseparable from the status of an insured member. The organic act makes it so, and no kind of stipulation between the agents of the company and the person who becomes insured can supersede or impair it. It would be just as practicable for a person entering into marriage to provide by covenant against its necessary and imperative duties and obligations."

That respondents knew that the insuring company was a mutual casualty company, organized and chartered by authority of New York law, cannot be denied. The pleadings allege it [R. 21, paragraph 9, Exhibit H; R. 41-43,

Policy photo, R. 48 (a)]. By demurring generally all respondents admit this allegation.

When the nature of the insuring company is added to the question proposed, the answer is obvious. Respondents were members of the company. This is true whether the rule applicable to New York corporations or Georgia corporations be applied. It is amply confirmed by the decisions of this Court and of state courts cited in our brief (p. 18).\*

The second question proposed by respondents is: DOES THE STATUTE LAW OF NEW YORK ENTER INTO THE CONTRACT OF THE RESPONDENTS SO AS TO CREATE THE MEMBERSHIP RELATION WHICH UNDER THE NEW YORK LAW CARRIES WITH IT THE LIABILITY TO ASSESSMENT, OR MUST THAT RELATION BE FIRST CREATED BY THE CONVENTIONAL ACT OF THE PARTIES, WHEREUPON THE MEMBERS BECAME BOUND BY THE LAWS OF NEW YORK DEFINING THEIR LIABILITY?

The answer is obvious and we have answered it in our brief (p. 26). **Consent is not necessary to create liability arising out of the statute. Howarth v. Lombard**, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; **Bernheimer v. Converse**, 206 U. S. 516, and other decisions of this Court.

The authority cited by respondents (p. 13, their brief) supports our contention, not theirs. The respondents having voluntarily become members of the corporation, "this assent creates the contractual element of the liability, bringing it within the protection of the constitutional pro-

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\*In addition to the recent cases cited in our brief (p. 18), the principle is recognized by a long and unbroken line of decisions. Among them are **Swing v. Taylor & Crate** (W. Va.), 70 S. E. 373, and **Huber v. Martin**, 115 Am. St. Report 1023, at 1034 (cited in our motion for rehearing, R. 102), holding: "It is thus laid down by text-writers, based on authority: 'Membership dates in each case from the time when the insurance is effected.' \* \* \* Am. & Eng. Ency. of Law, 2d Ed., 264-266."

hibition in regard to impairing the obligation of contracts.”†

The failure to mention the liability to assessment in the policy does not relieve respondents from liability. By their demurrers they have admitted the truth of the following allegations of the petition (Amendment of July 25, 1940, R. 22-23):

“It is the law of New York that every person who accepts a policy of insurance in a mutual insurance company thereby becomes a member thereof. \* \* \*

“It is the law of New York that the aforesaid section 346 compels the company to fix the contingent mutual liability of the members; and that failure to mention the liability to assessment in the policies or by-laws does not release policyholders from liability to assessment, but results in their liability being fixed in accordance with Section 346 of the New York Insurance Law. \* \* \*

“It is the law of New York that the laws of that state govern the rights, liabilities and duties on liquidation of policyholders in mutual insurance companies incorporated and liquidated in that state.”

### III.

We will now consider the brief of the respondents, following the subject matter used therein.

1. Respondents contend: **FULL FAITH AND CREDIT NOT DENIED PETITIONER; THIS COURT SHOULD DECLINE JURISDICTION.**

We agree with the respondents that the decree entered by the Master was not a personal judgment against the

†Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation, 23 *Harvard Law Review*, pp. 37-48. Other portions of this scholarly article fully support the propositions for which we contend.



nonresident respondents. For this reason the case of **Pennoyer v. Neff**, 95 U. S. 714, is no wise in point.

The judgments upon which we rely are enumerated in our brief (pp. 43-44). Such judgments come within the rule announced in **Bernheimer v. Converse**, supra, and similar cases. In a stockholder's assessment suit, **Gilson v. Appleby**, 81 Atlantic 925, 926, this distinction was clearly stated. A quotation from that decision disposes of the question:

"The contention is based upon the idea that such a decree, rendered against him under the circumstances indicated, would be in violation of the right guaranteed to him by the fourteenth amendment of the federal Constitution, as construed in **Pennoyer v. Neff**, 95 U. S. 714, 24 L. Ed. 565. But the doctrine of that case does not go to the extent claimed for it. Although it was there held that a personal judgment obtained against a defendant who was not a resident of the jurisdiction in which it was rendered, and who has not been served with process in that jurisdiction, and had not appeared, was void, the court was careful at the end of its opinion, in order 'to prevent any misapplication of the views expressed' in it, to make the following statement: 'We do not doubt that a state, on creating corporations for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, **their obligations enforced**, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law.' That a proceeding like that now before us, when it results in an adjudication against a nonresident stockholder, not served with process, such as is prayed for by the receiver, neither deprives a stockholder of his property without due process of law, nor denies him the equal protection of the law, is settled, as we read its opinion, by the United States

Supreme Court, in the case of *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.”

The identical question was recently passed upon by this Court.

**Titus v. Wallick**, 306 U. S. 282-292.

At page 287 the Court said:

“The right asserted by petitioner to have the New York judgment enforced in the courts of Ohio (Georgia) is one arising under the Constitution and a statute of the United States. And since the existence of the federal right turns upon the legal effect of the proceedings in New York and the validity of the judgment there, the rulings on those points by the Ohio (Georgia) court are reviewable here. \* \* \* While they involve questions of local law \* \* \* its determination cannot be accepted here as decisive if the constitutional command is to be observed.”

The respondents referred to judgments and entirely overlooked the claims based on the **statutes of New York** and the **charter** issued thereunder. A controversy respecting the full faith and credit, to which these are entitled, raises a federal question for determination by this Court.

**Hancock National Bank v. Farnum**, 176 U. S. 640;

**Adam v. Saenger**, 303 U. S. 59;

**Sovereign Camp W. O. W. v. Bolin**, 305 U. S. 66,  
supra;

Our brief, pages 13, 14.

#### **OTHER CASES CITED BY RESPONDENTS ARE NOT IN POINT.**

**Wisconsin v. Pelican Insurance Co.**, 127 U. S. 265, is not in point. It was held that the case was not within the class over which this Court had original or appellate jurisdiction.

Nor is **Bagley v. General Fire Extinguisher Co.**, 212 U.

S. 477, anyway in point. The appellant was not a party to the judgment which it sought to use as a basis for the constitutional protection invoked. The Court also found that it was without jurisdiction because a constitutional question had not been raised in the complaint.

**Commercial Publishing Company v. Beckwith**, 188 U. S. 567, went off on the same principle. From the meager record before the Court it did not appear that the person asserting the constitutional protection to which the decree was entitled was a party at the time of the entry of the decree, the burden resting upon him to prove this fact and the record leaving the matter in doubt, this Court very properly refused to sustain the claim.

The cases of **Old Wayne Mutual Life Association v. McDonough**, 204 U. S. 8, and **Wetmore v. Karrick**, 205 U. S. 141, are not in point. They merely state a familiar principle of law that a judgment rendered in personam without jurisdiction of the person is void.

**Pacific Employer's Inc. Co. v. Industrial Accident Commission of California**, 306 U. S. 493, is no wise in point. The case deals with rights arising out of workmen's compensation laws of California, applied to an injury which took place there and for which damages were sought in its courts. There the refusal to give full faith and credit to and thereby substitute for its own statute the laws of another state in conflict with the public policy of California was sustained by this Court. But no such question of public policy is here involved. By direct ruling the Supreme Court of Georgia eliminated this question from the record. It said (R. 94):

“ \* \* \* we are not here concerned with the rule  
\* \* \* whether the court of the forum will decline to apply the law of the situs when the application of such law would contravene the established public policy of

the forum. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, \* \* \* 92 A. L. R. 928, and cit.”

The court below could not have justified its refusal to enforce the cause of action by any alleged conflict with its public policy because its public policy was entirely consistent with the decisions in New York. In ***Alma Gin & Milling Co. v. Peeples***, 145 Ga. 722, it had accorded to Georgia residents the very relief here sued for and under identical circumstances. It justifies its refusal to accord similar relief to petitioner on the ground that petitioner sued on a contract made in Georgia and to be measured by the laws of that state.

As heretofore stated, the basic error upon which rests the decision of the court below, and the argument of the respondents, arises from a mistaken assumption that the relationship between mutual policyholders and the association arises entirely out of the policies issued by the association. The Supreme Court of Georgia clearly evidences this viewpoint when it says (R. 93), “Was there anything in **their contracts with the companies, to wit, the policies themselves**, which constituted them members?” (Emphasis ours.) But the contracts with the company and the policies are not synonymous. The policies are evidence of one relationship—the contracts with the company are two-fold. (a) The company insured the policyholders. Any action arising out of this insurance is based on a Georgia contract and determinable by its laws. (b) The policyholders became members of the mutual association. That contract was made and certainly was to be performed exclusively in New York, and the laws of New York and the decisions of its courts are decisive of all rights and liabilities arising thereunder.\* Petitioner’s action is based

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\*The rights of membership are governed by the law of the state of incorporation.” *Sovereign Camp W. O. W. v. Bolln*, supra, 305 U. S. 66, at 75 (2).

upon the second relationship between the parties.† The court below refused to consider it, thereby depriving petitioner of his rights under the contract and the benefits of the statutes of New York and the judgments in the liquidation proceedings.

Viewed from this standpoint, the courts of the forum may not constitutionally deny recognition of foreign laws. The courts of the domicile are the only courts which can determine the value of the assets, amounts of liabilities, the percentage of assessment and the recognition of the rights of creditors, which include the policyholders. Under such circumstances the laws of the domicile prevail.\*

Whether the courts of the forum may constitutionally deny enforcement of foreign laws depends upon the circumstances of each case. This Court so points out in a recent decision.

**Griffin v. McCoach**, ... U. S. ..., 61 Sup. Ct. 1023.

The case is reported in 134 A. L. R. 1462 with an excellent note at page 1472.

The instant case properly falls within the second class mentioned in this note. Such cases as **John Hancock Life Ins. Co. v. Yates**, 299 U. S. 178, and **Hartford Accident & Indemnity Co. v. Delta & Pine Lane Co.**, 292 U. S. 143, govern this case.

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†"It sometimes happens that a contract may be intended by the parties to be performed, as to different parts thereof, in several places. If the contract relates to several distinct and divisible acts, there is no difficulty in perceiving that as to each of these several acts in performance of the contract the contract may have a separate locus solutionis. In reality, there are several contracts in one."

Minor on Conflict of Laws, Sec. 160, cited in **Mutual Benefit Health & Accident Assoc. v. Baldrige**, 70 Federal (2) 236.

\*An excellent illustration of this principle will be found in **Relf v. Rundle**, 103 U. S. 222, cited with approval by the Supreme Court of Georgia in **O'Malley, Supt., v. Wilson**, 182 Ga. 97, 185 S. E. 109, and **Canada Southern Railroad Co. v. Gebhard**, 109 U. S. 527. These cases will be discussed in the concluding portion of this brief.

2. Respondents contend: THE ACTION IS NOT AN ACTION FOR UNPAID PREMIUMS.

A casual examination of the record disproves this contention. It should be remembered that the liquidation statute of New York specifically provides for the determination of other indebtedness, as well as assessments (R. 30, Sec. 423).

In the original petition (R. 8, paragraph 7) appears a definite claim for assessments due from each policy and "pursuant to Section 423 \* \* \* the amount of indebtedness of each member to the Company apart from the indebtedness for assessment."

The itemized statement of the indebtedness (R. 11-14) specifically sets forth the other indebtedness and the premiums, and the Supreme Court of Georgia in its statement of the case (R. 85) finds that the Superintendent computed the amount of the assessment and pursuant to section 423 computed the amount of indebtedness of each member to the company apart from the indebtedness for assessment.

The Supreme Court of Georgia, in an identical case, **Globe & Rutgers Fire Ins. Co. v. Salvation Army**, 177 Ga. 890, at 898, recognized the right of the plaintiff, first asserted on rehearing, to recover premiums though the main relief prayed for had been denied.

3. Respondents' third contention, THE SOLE QUESTION INVOLVED, has been dealt with in the opening part of this brief. Without repeating the questions, we will deal briefly with the authorities cited.

Respondents place a strained construction upon **Supreme Council of Royal Arcanum v. Green**, 237 U. S. 531, when they say that Green was unquestionably a member of his association. But Green accepted his policy and joined the



association in New York, and the question there involved was whether the courts of New York were bound to accord full faith and credit to the laws of Massachusetts, the domicile of the corporation. The case does not turn on the narrow distinction suggested. It holds that, notwithstanding the local incidents which surrounded his entry into the association, the company was a Massachusetts corporation, and the rights of membership were governed by the laws of that state. As we pointed out in our original brief, the principles there announced are not limited to fraternal orders.

Respondents quote from **Sovereign Camp W. O. W. v. Bolin**, 305 U. S. 66, and assert that inasmuch as the Missouri courts were powerless to disregard the fundamental law of the association and turn a membership beneficiary certificate into an old-line policy, New York is likewise unable to turn an old-line policy into a beneficiary certificate or mutual policy. But this argument begs the question. This is not an old-line policy. It is a mutual policy, issued by a corporation incorporated in New York, under whose statutes and the charter of the company submission to assessment was mandatory. The distinction is fully pointed out in the quotations made by us from the **Green case** (our brief, p. 16).

Respondents' citation of **Chandler v. Peketz**, 297 U. S. 609, is garbled. The Court (at p. 611), after asserting the familiar principle that stockholders in foreign states are bound by the decree of assessment in the state of the domicile, points out that such decrees are not in the nature of personal judgments, and that no stockholder is precluded from making defenses personal to himself. In that case, as in this one, no personal defenses were asserted. The action of the state court in dismissing, on general demurrer, a petition seeking to recover the assessment was reversed. This is the relief prayed for here.



Respondents admit that under similar circumstances a stockholder's assessment would be collectible. That liabilities of stockholders and of members of a chartered mutual association are analogous is quite clearly established in this Court. **Duffy v. Mutual Benefit Life Ins. Co.**, supra, 272 U. S. 613 (original brief, p. 18, this brief, p. 4). Respondents, as members, are clearly liable. Borrowing an authority from respondents' brief (*Broderick v. Rosner*, p. 9), the respondents having accepted policies, should not be permitted "to escape from the provisions of a voluntarily assumed statutory obligation, consistent with morality, to contribute to the payment" of creditors of an insurance company of another state of which they were policyholders.

Finally respondents assert that they have found no decided case where the policyholder is subjected to liability because of the mere acceptance of such a policy. Ample authority for this proposition is found in our brief (p. 29 et seq.).

4. Respondents assert: **THESE DEFENDANTS DID NOT UNDER THEIR CONTRACTS BECOME MEMBERS OF THE ALLEGED MUTUAL INSURANCE COMPANY.**

The argument under this section illustrates the basic misconception which permeates the entire brief. A mutual insurance contract, from its very nature, is twofold—insured and insurer. The respondents are sued as insurers. The authorities which they cite do not deal with this relationship.

Respondents cite isolated sentences from **Couch on Insurance**, and thereby the meaning of the text is destroyed. One illustration will suffice. Quoting from **Couch on Insurance**, Section 251 (p. 11, their brief), they con-

clude the paragraph with a period and enclose it in quotation marks. This results in a complete distortion of the text. The complete sentence is divided by a semicolon and is as follows: “\* \* \* and in such a case the plan is not that of mutual insurance; at least, under the Illinois laws.” It is, therefore, quite evident that respondents have not placed the true rule before the Court.

In the same paragraph (Sec. 251) the text-writer continues as follows:

“However, the generally accepted rule seems to be the better one, so that the mere fact that the premiums are paid in cash does not necessarily destroy the feature of mutuality. Of course, where this rule is adopted each member has an interest in the surplus premium fund, if any, remaining after payment of losses and expenses, and this latter feature marks a distinction between ~~mutual~~ mutual companies and stock companies, for the policyholder in a stock company has no such right.”

Furthermore, it is evident from the same text that the New York mutual company referred to therein was a life insurance company organized under the New York Statute of 1849, Chapter 309, which contained provisions entirely different from the statutes governing a casualty company. Indeed, life insurance companies, chartered in New York, have for many years been permitted to issue nonassessable policies. This rule did not apply to mutual casualty companies and, as pointed out in our brief (page 25), it required a change in the statute to accomplish this purpose.

The liabilities to which policyholders in a mutual company subject themselves depends entirely upon the statutes of the state of the company's domicile. Mr. Couch has stated the rule correctly (section 253, page 603), when he said:

“And the above rules are especially subject to those

exceptions which arise in favor of such companies by reason of express statutory exemptions from the operation of the general insurance statutes which some of the states have enacted, or other statutory provisions defining or fixing their status. \* \* \*."

**Craig v. Western Life Ins. Co.**, 116 S. W. 1113 (Respondents' Brief, p. 13), is not in point. It merely holds (compare second headnote, p. 1114) that a company, chartered in Illinois, writing assessment policies and assuming liability on old-line policies, may not impose the latter liability upon funds arising from assessments.

With respondents' citation from **23 Harvard Law Review**, at page 38, we are in entire accord. Acceptance of the policy evidences assent, and the rule quoted completely destroys their defense.

"This assent creates the contractual element of the liability, bringing it within the protection of the constitutional prohibition in regard to impairing the obligation of contracts."

(Respondents' Brief, p. 13; this Brief, pp. 6-7.)

Respondents cite Section 346 of the New York Insurance Laws (Their Brief, p. 14), requiring the corporation to make provisions for the contingent mutual liability of the members in the by-laws and the policies. The record discloses that such provision was made in the by-laws (R. 23). The failure to make the same provision in the policies does not relieve the policyholders of this liability.

**In re Auto Mutual Indemnity Company**, 14 N. Y. S. (2) 601;

(Appendix to brief accompanying petition for certiorari, pp. 40-41);

**Beha v. Gale**, 223 N. Y. Supp. 253.

Members of mutual associations are universally bound by the by-laws. Our brief demonstrates that this is the

rule in Georgia and in New York.\* It is recognized by this Court in a case which we cited in our original brief (p. 31), **Mutual Assurance Society v. Korn and Wisemiller**, 7 Cranch. 396, that policyholders of mutual associations are bound by its by-laws. This Court, at page 399, referring to its previous decision in **Korn and Wisemiller v. Mutual Assurance Society**, 6 Cranch. 192, says:

“It is there laid down, and on reflection we are confirmed in the opinion, that in the capacity of an individual of the body corporate the defendants are bound by the by-laws of the society as far as is consistent with the nature of its institution.”

And in the case of **Korn and Wisemiller v. Mutual Assurance Society**, 6 Cranch. 192, at 201, this Court said:

“We are of the opinion that while Korn and Wisemiller continued members of the society, they remain subject to the general liability which that state imposes; \* \* \*.”

5. Respondents assert: THE NATURE OF THE POLICY ISSUED DID NOT CONSTITUTE THE POLICY-HOLDERS AS MEMBERS.

This argument overlooks the fact that it is not the policy from which their membership arose. It is their status which determined their membership—the policy is only evidence of it.

6. EFFECT OF THE WORD “MUTUAL” IN THE POLICY.

What has been said above disposes of all contentions here made.

7. Respondents assert: THE POLICY HAVING BEEN ISSUED IN DIRECT VIOLATION OF LAWS OF NEW

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\*The rules have been cited (p. 2, *supra*.)

## YORK, THE POLICYHOLDER CANNOT BE HELD LIABLE FOR ASSESSMENT.

We deny this argument at the threshold. The policy was not issued in direct violation of the laws of New York. It did not violate the laws directly or by implication, and the provisions in the laws of New York requiring these provisions to be placed in the policy do not specify that they be placed in the face of the policy. But further and beyond this, we have heretofore demonstrated that the failure to include this provision in the policy does not relieve respondents from liability to assessment. (This brief, *supra*, pp. 6-7; original brief, pp. 26-29.)

**Irwin v. Currie**, 64 N. E. 161, cited under this section, not only fails to support the rule contended for, but the ruling is to the contrary. The Court refused to hold invalid a contract for the division of fees between a layman and a lawyer because the penalty of the statute was applicable to the lawyer. The Court also refused, by implication, to extend it to the layman. Here there is no statute making the act unlawful.

Respondents raised no such points in their defenses, nor did the courts below consider them. There is a very cogent reason why respondents have not heretofore contended that the policy was issued in violation of law. They have relied on the policy in bringing an action in the courts of Georgia to subject the statutory deposit made by the company, as a condition to its qualification in the state, and the respondents in whose behalf the brief is filed in this court have filed large claims in the liquidation proceedings in New York. Seeking benefits under the policies, they cannot destroy them on the theory that they were issued in violation of law.

**Greenlaw v. Aroostook County Patrons Mutual Fire Ins.**

**Co.**, 105 Atlantic Reporter 116 (Respondents' Brief, p. 18), is nowise in point. It involves the liability of the insurance company as an insurer.

**New York Life Ins. Co. v. Street**, 265 S. W. 397, deals with the same relationship. There a life insurance company, authorized by its charter to issue a policy, was, after many years acquiescence, estopped from denying the force of the policy.

8. Respondents contend: **THE LIQUIDATOR HAS NO GREATER RIGHT TO RECOVER AGAINST POLICYHOLDERS THAN THE COMPANY HAD PRIOR TO LIQUIDATION.**

Neither the general rules of law nor the authorities cited sustain this proposition. **Beha v. Breger**, 223 N. Y. S. 726, does not truly state the law of New York. The identical question was decided by another trial judge in **Beha v. Weinstock**, 221 N. Y. Supp. 500, and was reversed by the Court of Appeals of New York in **Beha v. Weinstock**, 246 N. Y. 221 (Our Brief, p. 29). The liquidator, suing in behalf of creditors, may recover though the company might be estopped.

The terms of a contract which contravene a statute do not make the contract void. The contract remains, but the invalid provisions are nugatory after insolvency sets in.

**Handley v. Stutz**, 139 U. S. 417, 35 L. ed. 234.

The insurance laws of New York are exclusively controlling on this subject and all provisions of general or statutory law in conflict therewith are excluded.

**In re National Surety Company**, 27 N. E. (2) 505.

“Every restriction upon the defendant's contractual power, imposed by these laws (New York Insurance

Laws), followed the defendant into every jurisdiction where it undertook to contract.”

**Slisberg v. New York Life Ins. Co.**, 155 N. E. 749, at 753.

Had the officers of the company attempted to except particular policies from the burden of assessment, the action would have been ultra vires and ineffective.

**Cooley's Briefs**, 2d Edition Supp., p. 1587;

**Beha v. Gale**, 223 N. Y. S. 253;

**Lahey v. Lahey**, 66 N. E. 660 (Court of Appeals of New York).

“Doubts which otherwise might have existed in respect to the character and effect of the transaction are no longer open.”

**Coombes v. Getz**, 285 U. S. 434, 448.

9. Respondents contend: RESPONDENTS ARE BOUND ONLY BY POLICY PROVISIONS IN FACE OF POLICY.

Respondents here concede that the statute laws of Georgia are not applicable to casualty insurance. Assuming as true that the laws of Georgia require that the policy of insurance be entirely in writing, this does not apply to the provisions for assessment when the action is instituted by creditors. The Supreme Court of Georgia has so decided in direct language. **Alma Gin & Milling Company v. Peebles**, supra, 145 Ga. 722 (Our Brief, p. 47).

The Georgia cases cited by respondents deal entirely with liability arising out of losses covered by the policies.

**Dwindell v. Kramer**, 92 N. W. 227, is an exceptional case, based upon the statutes of that state. The excerpt which is quoted by respondents is a portion of the statute and in the absence of this condition there was no liability. The ruling sustains the contentions here made. In order for this principle to become applicable, the statute must itself



provide that these provisions shall be plainly and legibly stated in the face of the policy. The New York statute containing no such provision, the entire argument will be disregarded.

**Baker v. Sovereign Camp W. O. W.**, 116 S. W. 513 (the citation should be 116 S. W. [2] 513), is not a true statement of the Missouri law. We must assume that counsel cited this case from a digest. Had they examined the case in the Southwestern Reporter they would have found evidence of its transfer to the Supreme Court of that state. The highest court of that state overruled the opinion of the Kansas City Court of Appeals (125 S. W. [2] 849) upon the authority of the decision made by this Court in **Sovereign Camp W. O. W. v. Bolin**, *supra*.

While the case is cited under the next heading, we will here consider **Wilhelm v. Security Benefit Association**, 104 S. W. (2) 1042, because it deserves the criticism made of the Baker case. The **Wilhelm case** has been overruled by name. The original opinion was quashed by the Supreme Court in 114 S. W. (2) 965, and when the case was next considered the principles stated in the former opinion were withdrawn (121 S. W. [2] 295). Indeed, that decision is in line with the general ruling that "the contract is not to be determined from the certificate only."

10. Finally respondents contend: THE RULINGS OF THE SUPREME COURT OF GEORGIA CONSTRUING A CONTRACT MADE IN THE STATE OF GEORGIA ARE BINDING AND FINAL.

The **Wilhelm case** has been discussed above. As pointed out, the rulings contended for were repudiated in 121 S. W. (2) 295.

The citation of the Baker case and the Wilhelm case clearly discloses that respondents persist in their original

errors, and that the position taken by them can be supported only by **overruled** cases. By the same type of citations the Supreme Court of Georgia was led into error. (See our Motion for Rehearing, R. 96-106.) There the respondents relied on **Lee v. Missouri State Life Ins. Co.**, 238 S. W. 858, and it was accepted by the Supreme Court of Georgia as a relevant authority (R. 95). But the **Lee case** had been reversed by name (261 S. W., p. 83), and evidence of its reversal appeared in the very report from which the citation was made (R. 105).

Respondents also relied upon, and the Supreme Court of Georgia accepted as an authority, **McClement v. Supreme Court I. O. F.**, 152 N. Y. S. 136 (R. 93), notwithstanding the fact that the rule upon which the McClement case was based had been specifically overruled by the Court of Appeals of New York upon the authority of **Royal Arcanum v. Green**, *supra* (McClement v. Supreme Court I. O. F., 119 N. E. 99).

**Pink, Supt., v. Georgia Stages, Inc.**, 35 Fed. Supp. 437, 444, while relied on by the Supreme Court of Georgia as an authority, does not support the claim. The District Judge denied recovery because of his erroneous construction of the New York statutes. He held (p. 444, Conclusion of Law No. 9) that the laws of New York did not prevent this company from issuing nonassessable policies. As pointed out in our motion for rehearing (R. 105), the case of **Factory Mutual Liability Ins. Co. v. Behan**, 253 N. Y. S. 562, was not brought to his attention. Clearly his ruling on this phase of the case was error.

### CONCLUSION.

In the brief which accompanied the petition for certiorari and the brief on the merits filed later, the errors committed in the court below are set forth.

Respondents have not challenged our contentions; their

principal defense boils down to a single ground: that the record does not disclose their promise to pay.

But the obligations of a statute are sufficient. Even a foreign statute produces an implied promise. In **Nashua Savings Bank v. Anglo-American Co.**, 189 U. S. 221, at 230, this Court ruled enforceable a charter obligation arising out of the laws of Great Britain. In **Canada So. R. Co. v. Gebhard**, 109 U. S. 527, obligations arising from the laws of Canada were enforced against bondholders resident in New York, though the bonds were payable in that state.

The statutes of New York impose contingent liability to assessment against all policyholders of mutual companies, including those resident in Georgia.

Auto Mutual Indemnity Company carried into Georgia the law of its existence (New York).

“Whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere.”

**Belf v. Rundle**, 103 U. S. 222, cited in 109 U. S. 527, at 537.

Respectfully submitted,

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# Supreme Court of the United States

OCTOBER TERM, 1941

No. 48

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LOUIS H. PINK, Superintendent of Insurance  
of the State of New York,

*Petitioner,*

v.

A. A. V. HIGHWAY EXPRESS, INC., ET AL.,

*Respondents*

---

**ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF GEORGIA**

---

**CONCLUDING ARGUMENT OF COUNSEL FOR  
PETITIONER, FILED IN WRITING BY SPECIAL  
PERMISSION OF THE COURT**

ELLIOTT GOLDSTEIN,  
• MAX F. GOLDSTEIN,  
• ALFRED C. BENNETT,

*Counsel for Petitioner.*

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# Supreme Court of the United States

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OCTOBER TERM, 1941

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No. 48

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LOUIS H. PINK, Superintendent of Insurance  
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## ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

---

### CONCLUDING ARGUMENT OF COUNSEL FOR PETITIONER, FILED IN WRITING BY SPECIAL PERMISSION OF THE COURT

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I.

**THE LIQUIDATION PROCEEDING IN NEW YORK  
IS THE STATUTORY SUBSTITUTE FOR A CREDI-  
TOR'S BILL FOR THE DISSOLUTION OF A CORPO-  
RATION, ITS LIQUIDATION AND THE DETER-  
MINATION OF THE RIGHTS OF ALL CREDITORS**

In New York, Chapter 28 of the Consolidated Laws  
(R. 26) completely covers the subject of insurance.

In re *National Surety Company*,  
27 N. E. (2) 505, (Our reply brief, p. 20).

In open court, Mr. Hooper, Counsel for the respondents, admitted that they had received notice of the liquidation proceedings and had elected not to show cause.

Exhibit "E" to the second report of the Liquidator, which was the basis of the judgments fixing the assessments (R. 36), is incorporated (as far as Georgia residents are concerned) in the original petition (R. 8, paragraph 7; R. 10, paragraph 14). Paragraph 7 is amplified (R. 21, paragraph 6, et seq.), and the policy now in controversy is identified in the record and was before the court when it considered the assessment against persons named in Exhibit "E" (R. 47).

Mr. Justice Douglas, during the argument, raised a question regarding the second defense outlined by the Georgia Supreme Court (R. 88) "that some of the defendants were not policyholders of the \*\*\* Company at the time of its dissolution." This issue was foreclosed by an amendment (R. 21, paragraph 9), and as this is admitted by demurrer, that issue is eliminated.

## II.

### **ALL RELIEF WAS DENIED TO PETITIONER, INCLUDING HIS COMMON LAW RIGHT TO RECOVER PREMIUMS (Our Reply Brief, p. 13)**

This was a denial of the title of the Superintendent and the case must be reversed on the authority of *Clark v. Williard*, 292 U. S. 112.

What Georgia will rule after a proper understanding of the Superintendent's title, is a matter first for con-

sideration by the State courts. Respondents do not seriously justify this denial of relief.

### III.

#### **RESPONDENTS HAVE POLICIES WHICH ARE ASSESSABLE OR THEY HAVE NO POLICIES AT ALL**

The suggestion in the argument that policyholders were misled by the fact that notice was on the back of the policy arose only in the argument of Counsel. There is no such defense in the record and the Supreme Court of Georgia did not base its opinion on that ground.

In the courts below respondents contended and the Supreme Court agreed with them that a mutual insurance company may issue policies on a cash premium and to policyholders who do not become members (R. 95). It is now conceded that a New York mutual insurance company cannot issue such policies. It must, therefore, follow that those who take these policies are members, or they are not insured at all. But none of the respondents have offered to rescind their policies. If legal grounds exist for such rescission, that is a matter for the State courts when the case has been returned with proper direction. However, we call attention to the fact that as against the rights of the public these policyholders cannot rescind. *Bolta Rubber Company v. Lowell Trucking Corp.*, 23 N. E. (2) 873 (improperly cited in our original brief as 25 N. E. (2) 973). And the further fact asserted in our briefs (original brief, p. 52, brief accompanying petition for certiorari, p. 28, reply brief, p. 2 (1)) that these policyholders have filed large claims in the liquidation proceedings in New York.



These claims were filed long after the rights of assessment had been asserted, and by intervening in the New York proceedings the policyholders became bound by the report of Referee Frankenthaler, or to say the least, they became estopped to contend that their policies are not subject to New York laws.

#### IV.

### **BY-LAWS ARE PART OF A MUTUAL POLICY WITHOUT INTERNAL REFERENCE THERETO**

Inquiry was made from the Bench by Mr. Justice Black regarding the presence of a reference to the by-laws in all of the fraternal insurance cases decided by this Court. We do not find such clear reference in the reported cases, however all the text books hold that the policyholders become bound although such constitution and by-laws may not be referred to in the certificates of membership. This subject is fully discussed in the recent decision of the Supreme Court of Maine on the identical assessment. *Pink, Supt. v. Town Taxi Co., Inc.*, 21 Atl. (2) 656, (Our brief, p. 10, 18, 22).

That the Georgia courts could not justify this denial of relief, based upon their own public policy or decisions, appears from *Barbot v. Mutual Reserve Fund Life Association*, 100 Ga. 681 at 694, a case not heretofore cited, holding:

"This being a mutual association, controlled by its members, and each bearing his share of the burdens for the benefit of the whole membership, the contract of a member is different from an ordinary life insurance policy. The latter is held to the con-

tract which determines the rights of the company and the insured, and to be the whole of the contract; but inasmuch as both the benefits and the burdens in a mutual society are to be equal and bearing on all its members alike, it is well settled that the certificate of membership is only a part of the written evidence of the contract, and that in such a society the charter, or constitution and by-laws in force at the time of the admission of a member, are terms of an executory contract, and that by entering the society the member assents to all of such terms; and that they each become a part of the contract of insurance, *whether they are incorporated in or referred to by the certificate of membership or not.*"

## V.

### **THE CONTRACT WHICH THE COMPANY ACTUALLY MADE CONSISTS OF THE ENTIRE POLICY, INCLUDING THE NOTICE OF CONTINGENT LIABILITY**

Reference was made in the argument to the legend on the folded back "National Standard Automobile Policy". The word "standard" has a definite meaning regarding coverage. The back of the folded policy also contains the contingent liability notice and informs the insured that the home office of the Company is in New York.

Aside from the contingent liability feature, one paying a cash premium to a mutual association is a member and bound by its by-laws. *Davis v. Oshkosh Upholstery Co.*, 82 Wis. 488, 52 N. W. 661 (R. 100).

One enjoying the privilege of a stockholder is bound though he never received his stock certificate. *DeLoach v. Bennett*, 156 Ga. 633 (R. 103).

## VI.

### **THE LIABILITY TO ASSESSMENT CANNOT BE MEASURED BY RESPONDENT'S PRESENT ATTITUDE**

It is asserted that the penalty of assessment was neither contemplated nor accepted. "The law does not permit the rights of creditors to be subjected to such a test", (Our brief, p. 21, citing *Sanger v. Upton*, 91 U. S. 563.

In all of the stockholder cases before the Court, such as *Converse v. Hamilton* and *Hancock National Bank v. Farnum*, the certificates contained no warning of the peculiar statutory provisions of those states, and certainly no person in a distant state, receiving these certificates, had any actual warning of the liability. An excellent discussion of this subject appears in *Hancock National Bank v. Ellis*, (Mass.), 42 L. R. A. 396 at 402, where the court said:

"Persons becoming stockholders in foreign corporations can ascertain the nature and extent of the liability of the stockholders in such corporations according to the laws of the state or country under which the corporations are organized, and they cannot complain if this liability is enforced against them."

## VII.

### **THIS CONTRACT IS COVERED BY THE LAWS OF NEW YORK**

The amount of the premiums discloses that the policies cover fleets of trucks or busses. It is a matter of pub-

lic notice that carriers of this type shop around for the cheapest insurance. They chose a small mutual company for reasons satisfactory to themselves. The premiums and terms of these policies are arranged in the home office. A mutual company has no agents, the person countersigning is an employee.

See *Hartford Steam Boiler Co. v. Harrison*, 183 Ga. 1, 187 S. E. 648, 301 U. S. 459.

Though the insurance was intended to cover vehicles which had their resting place in Georgia, the contract as a whole, including the dividends and assessments, was to be performed in New York and any claims against these policies were payable there.

In the absence of clear proof that this is a Georgia contract, and aided by the presumption that the rights of membership are governed by the laws of the state of incorporation (Bolin case, our reply brief, p. 3), this case falls squarely under the principles announced in *Coghlan v. South Carolina Railroad Co.*, 142 U. S. 101 at 109.

And it must be presumed that the parties intended to make a valid contract. If the assessment provision was not enforceable in Georgia, it must be presumed that the parties intended the contract to be made in a state where it was enforceable (*Pritchard v. Norton*, 106 U. S. 124, at 132, 133), otherwise, the policyholders would be defrauding the public service commissions with whom they qualified on the strength of these policies. (Petition for certiorari, p. 15).

### CONCLUSION

The Georgia Supreme Court applied its view of the general law when it said, (R. 95) "there are numerous

cases holding that a mutual insurance company may issue policies on a cash premium and to policyholders who do not become members." But it did not and could not say that this was the law of New York. For this vital error the case should be reversed.

*Pink v. Georgia Stages, Inc.*, 35 Fed. Supp. 437, fell into the same error. (Our reply brief, p. 23) .

Respectfully submitted,

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MAX F. GOLDSTEIN,  
ALFRED C. BENNETT,  
*Counsel for Petitioner.*

# Supreme Court of the United States

OCTOBER TERM 1940

No. 932 48

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK.

*Petitioner.*

vs.

A. A. A. HIGHWAY EXPRESS, INC.; H. A. ADAMS, TRADING AS ADAMS TRANSFER CO.; H. L. BASS, AS BASS BUS LINE; SERVICE COACH LINE, INC.; EAST & WEST MOTOR LINES, ROY R. REAGIN, GEORGIA MOTOR EXPRESS, INC., S. S. SALE, SALE TRANSFER CO., SOUTHEASTERN STAGES, INC., EVERREADY CAB COMPANY, J. H. BOOKER, D/B A SAVANNAH BEACH LINE AND OR ATLANTIC STAGES; FLETCHER T. KAYLOR, D/B A KAYLOR TRANSFER CO.; J. F. MURRAY, D/B A GEORGIA ALABAMA COACH LINE; KALER PRODUCE COMPANY, COX BROS. UNDERTAKING CO., INC., ATLANTA MACON MOTOR EXPRESS, INC., SOUTHEASTERN MOTOR LINES, INC., AND OR CEDARTOWN BUS LINE, J. RUSSELL, D/B A RUSSELL TRANSFER CO., CONTINENTAL CARRIERS, INC., BATEMAN COMPANY, INC., DOWNIE BROTHERS CIRCUS, KINNETT ODOM COMPANY, INC., SOUTHERN STAGES, INC., WEATHERS BROS. TRANSFER CO., INC., M. & A. MOTOR FREIGHT LINES, INC.

*Respondents.*

## BRIEF IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

✓ ALLEN POST,  
Atlanta Natl. Bldg.,  
Atlanta, Ga.

✓ A. O. B. SPARKS,  
T. BALDWIN MARTIN,  
Macon, Ga.,

Of Counsel for Respondents

**SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1940**

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**No. 932**

---

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW  
YORK.

*Petitioner.*

*vs.*

A. A. HIGHWAY EXPRESS, INC.; H. A. ADAMS, TRADING AS ADAMS  
TRANSFER CO.; H. L. BASS, AS BASS BUS LINE; SERVICE COACH  
LINE, INC.; EAST & WEST MOTOR LINES, ROY R. REAGIN, GEOR-  
GIA MOTOR EXPRESS, INC., S. S. SALE, SALE TRANSFER CO.,  
SOUTHEASTERN STAGES, INC., EVERREADY CAB COMPANY, J.  
H. BOOKER, D/B/A SAVANNAH BEACH LINE AND/OR ATLANTIC STAGES;  
FLETCHER T. KAYLOR, D/B/A KAYLOR TRANSFER CO.; J. F. MUR-  
RAY, D/B/A GEORGIA ALABAMA COACH LINE; KALER PRODUCE COM-  
PANY, COX BROS. UNDERTAKING CO., INC., ATLANTA MACON  
MOTOR EXPRESS, INC., SOUTHEASTERN MOTOR LINES, INC.,  
AND/OR CEDARTOWN BUS LINE, J. RUSSELL, D/B/A RUSSELL TRANSFER  
CO., CONTINENTAL CARRIERS, INC., BATEMAN COMPANY, INC.,  
DOWNIE BROTHERS CIRCUS, KINNETT ODOM COMPANY, INC.,  
SOUTHERN STAGES, INC., WEATHERS BROS. TRANSFER CO.,  
INC., M. & A. MOTOR FREIGHT LINES, INC.

*Respondents.*

---

BRIEF BY COUNSEL FOR ROY R. REAGAN, GEORGIA MOTOR EX-  
PRESS, INC., S. S. SALE, D/B/A SALE TRANSFER CO., SOUTHEASTERN  
STAGES, INC., KALER PRODUCE COMPANY, COX BROTHERS UN-  
DERTAKERS, ATLANTA-MACON MOTOR EXPRESS, INC., AND/OR  
CEDARTOWN BUS LINE, CONTINENTAL CARRIERS, INC., BATEMAN  
COMPANY, INC., DOWNIE BROTHERS CIRCUS, KINNETT-ODOM  
COMPANY, INC., SOUTHERN STAGES, INC., UPON THE QUESTION  
OF PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable Charles Evans Hughes, Chief Justice of  
the United States, and the Associate Justices of the Supreme  
Court of the United States:*

In response to the petition for certiorari in the above  
stated case, these respondents respectfully show.

**I. STATEMENT OF LEGAL  
PRINCIPLES INVOLVED**

We cordially differ from Counsel for Petitioner as  
to the actual ruling which was made by the Supreme  
Court of Georgia in the above stated case.



Insofar as the vital issues in this case are concerned, we interpret the decision of the Georgia Supreme Court (See Record, pages 82 - 96 inclusive), to rule the following:

"Under the laws of Georgia, the policies of insurance which constitute the basis of plaintiff's action, did not sufficiently set forth either in substance or by reference, either the statute laws of the State of New York, the charter provisions of Auto Mutual Indemnity Company, or the by-laws of said Association, so as to charge the named policyholders with liability under such statutes, charter and by-laws."

We do not agree that the State of Georgia has failed to accord full faith and credit to the laws of New York nor to the assessments as levied by the courts of New York in the Liquidation proceedings. We have admitted throughout this case that the policyholders were bound by the decrees of the New York courts fixing the necessity for assessments and the amounts of assessments but have made the sole contention that the defendants in the court below never did become members of the alleged Insurance Association, and therefore are not liable for assessment as such.

To illustrate that the Supreme Court of Georgia based its decision entirely upon the principle of law that a person cannot become a member of such an association without his own consent, we call attention to the following portions of the decision of the Georgia Supreme Court:

After holding that the insurance contracts were Georgia contracts subject to interpretation by the courts

of this state (See Headnote 4) the court ruled that the references on the back of the policy were not a part of the contract and, taken together with the language in the face of the policy fail to constitute the policyholder as a member of the Association (See Headnote 5).

These defendants do not deny that they are bound by the decisions of the New York courts in determining the amounts of assessments and the necessity therefor and the Supreme Court of Georgia so ruled. (See Record, page 88, headnote 2). Under the decisions there cited, there was still open to such policyholders who were sued in the courts of their respective residences, the question as to whether or not they were in fact members, and liable for any amount whatsoever. On that issue they had never had their day in court (See page 90 of the Record). The first litigation in which that question was raised was the case at bar. In the case at bar defendants, while not denying the necessity for assessments or the amounts thereof, simply contend that they are not members of the Association, for the reason that they never have entered into a contract which made them such a member, and that the policy which they accepted from the Auto Mutual Indemnity Company, did not apprise them of the laws of the State of New York, or the charter or by-laws of the Company, or sufficiently put them on notice that there was any assessment liability to be incurred by them in accepting the policy.

On page seven of the Petition for Writ of Certiorari opposing counsel makes the following statement.

"The Supreme Court of Georgia held that in a suit brought by the statutory liquidator of an insolvent insurance company for the recovery of assessments against policyholders, recommended by

the liquidator and approved by the domiciliary court, the laws of the forum afford the sole test of liability and the statutes, charter and decrees of the domicile must be disregarded."

A careful study of the decision by the Supreme Court of Georgia will lead to the conclusion that, in its last analysis the Supreme Court of Georgia decided only one question, and the decision of that one question was conclusive upon the entire case. The principle announced in the decision which we consider controlling is the following:

"A person cannot be made a member or stockholder of a corporation without his consent." (R-90).

The entire decision of the Georgia Supreme Court is based upon the foregoing principle of law. The application of that principle of law to the case in hand is dealt with fully by the Supreme Court, and the ruling of that court is that in the face of the policies involved it did not sufficiently appear that Auto Mutual Indemnity Company was doing business upon an assessment plan, the face of the policy did not provide for assessments, the face of the policy did not make the statutes of New York a part of the policy, nor did the face of the policy make the charter and the by-laws of the Company a part of the policy, as required by the laws of Georgia.

The question of full faith and credit is not involved in the decision of the Supreme Court. Under the ruling of the Georgia Supreme Court, the laws of New York were not properly made a part of the con-

tract, and since not being a part of the contract, such laws could not be enforced against the policyholder, nor could such laws even be put in evidence in the trial of the case in Georgia.

As elsewhere pointed out herein, our contention is that the Supreme Court of Georgia is the final authority to pass upon the construction of the contract, which was issued in Georgia, received in Georgia, to be performed in Georgia, and subject in all respects to be construed by the laws of Georgia.

Opposing counsel insists that the judgments and decrees of the New York courts in the liquidation proceedings are binding upon these defendants in Georgia, and that the refusal by the Supreme Court of Georgia to make such New York decrees a binding judgment in Georgia is a violation of the full faith and credit clause of the constitution. We admit that such decrees of the New York courts are binding upon these defendants provided these defendants became members of the Insurance Association, but the decisions of all the courts are unanimous in holding that such a decree does not adjudicate the persons who are liable therefor, but only adjudicates the necessity for the assessments and the amounts thereof.

"But the order was not, and did not purport to be, a judgment against anyone. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount."

*Great Western Telegraph Company, vs. Purdy*, 162 U. S., 329.

The Georgia Supreme Court raised this question:

"Was there anything in their contracts with the companies, to-wit, the policies themselves, which constituted them members?" (R-93). The court then points out that the laws of Georgia determine "when and how such laws, when foreign, are to be adopted, and, in all cases not specified, supplies the applicatory law." Citing *Scudder vs. Banks*, 91 U. S., 406, 411. (R-94).

All avenues of thought and discussion of this case lead to one focal point, to-wit, the determination of the question as to whether the policies issued to the defendants constituted them members of a foreign assessment company and their defense is based solely upon their contention that the contract did not make them members. What tribunal shall say whether or not they became members?

## II. DECISION OF GEORGIA SUPREME COURT CONSTRUING THE POLICIES IS NOT REVIEWABLE

Georgia Supreme Court held that the policies in question were Georgia contracts, and subject to be construed by the courts of Georgia. On cases sustaining that ruling we refer to Page 93 of the Record. The Supreme Court of Georgia is, therefore, the court of last resort in construing these contracts, and in determining whether the policies constitute the policyholders members of the Insurance Association. Had the Georgia Supreme Court ruled that the defendants, by acceptance of these policies, became members of the Insurance Association, then the sole defense of these policyholders would have been denied them. If the Supreme Court of Georgia had ruled that the statutes of New York were

sufficiently made a part of the contracts of insurance, then the policyholders would have been subject to the provisions of the laws of New York, because such laws were a part of the contract. As to whether such New York laws however, were made a part of the contract, is a question to be decided by the courts of Georgia where the contract was made.

We do not think it will be seriously disputed that the State of Georgia has the right to regulate the manner in which policies shall be issued in this state. As a matter of fact, the State of Georgia has a very definite policy in regard to the issuance of insurance contracts in the State of Georgia, and such public policy of the State of Georgia must be recognized and adhered to by any foreign insurance company, mutual or otherwise, issuing its policies in the State of Georgia. Included among the reasonable regulations of the State of Georgia are the regulations that policies of insurance must be in writing, and also that only such provisions of a policy as are contained in the face of the policy shall be binding upon the policyholder, and provisions placed upon the back of a policy shall not be binding upon the policyholder. As illustrating this legislative and judicial policy existing in Georgia we call attention to certain statutes and decisions of Georgia:

Section 56-213, Civil Code of 1933 Provides:

"Contracts of insurance to be entered into by any company organized under this Chapter shall not be binding unless evidenced by a policy of insurance in writing or print or both, and the liability of said company in case of loss sustained by any policyholder shall be governed by the terms,

stipulations, and conditions appearing *upon the face of the policy*. No policy or other contract of said corporation shall be binding unless it shall be signed by the president or vice-president and secretary or assistant secretary of the company."

Section 56-811, Civil Code of 1933 provides:

"All fire insurance policies issued upon the property of persons within this State, whether issued by companies organized under the laws of this State or by foreign companies doing business in this State, *which contain any* reference to the application for insurance, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain, or have attached to said policy, a correct copy of said application signed by the applicant, and of the constitution, by-laws, and rules referred to; and unless so attached and accompanying the policy, no such constitution, by-laws or rules shall be received in evidence either as part of the policy or as an independent contract in any controversy between the parties to or interested in the said policy, nor shall such application, constitution, by-laws or rules be considered a part of the policy or contract between such parties."

Section 56-904, Civil Code of 1933 provides:

"All life insurance policies issued upon the lives of persons within this State, whether issued by companies organized under the laws of this State or by foreign companies doing business in this State, which contain any reference to the applica-



tion for insurance, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain, or have attached to said policy, a correct copy of said application signed by the applicant, and of the constitution, by-laws and rules referred to; and unless so attached and accompanying the policy, no such application, constitution, by-laws or rules shall be received in evidence either as part of the policy or as an independent contract in any controversy between the parties to or interested in the said policy, nor shall such application, constitution, by-laws, or rules be considered a part of the policy or contract between such parties."

Section 56-1502, Civil Code of 1933, relating to assessment insurance companies, provides in part as follows:

"Every policy or certificate issued to a resident of this State by any corporation transacting therein the business of life insurance upon the assessment plan, or admitted into this State under the assessment laws of Georgia, shall print in bold type, in red ink, in every policy or certificate issued upon the life or lives of the citizens of Georgia, making one of the principal lines near the top thereof, the words "issued upon the assessment plan," and the words "assessment plan" shall be printed conspicuously in red ink in or upon every application, circulated, or caused to be circulated by such corporation within this State."

In the case of *Smily vs. Globe Fire Insurance Com-*

*pany*, 28 Ga. App., 766, the Georgia Court of Appeals said in part:

"Conditions and stipulations printed on the back of a Fire Insurance policy and not mentioned or referred to on the face of the policy, are not part of the policy or binding on the assured."

We call attention to the decision of the Georgia Supreme Court in the case at bar (Record, page 95-96) to the effect that recitals on the back of the policy were not a part of the policy, and that the "terms of the policy not only failed to put the defendants on notice that he was accepting a policy in a company which was subject to assessments under the laws of the State of New York, but failed in anywise to suggest that the company issuing the policy was an assessment company at all."

All the authorities recognize that the right to assess is based upon the contract but of course the laws can be made a part of the contract also. The courts of New York recognize this principle in *Beha vs. Weinstock*, 160 N.E., page 17, where the court said:

"Every member shall be liable for his proportionate part of any assessment laid by the corporation in accordance with law and his contract."

It will be noted that Section 346 of the Insurance Laws of the State of New York which are pleaded by the plaintiff, provide "the corporation shall in its by-laws and policies fix the contingent mutual liability of the members for the payment of losses and expenses not provided for by its admitted assets." It therefore appears to be also the policy of New York State that the policies shall contain provisions as to contingent liability.

The overwhelming weight of authority in this country is to the effect that provisions on the back of a policy do not become a part of it, particularly when not referred to in the policy itself. Georgia has adopted the same rule.

In the case at bar Georgia Supreme Court said in part:

"The notation on the back of the policy referred to in the preceding statement of facts was not a part of the policy and therefore not a part of the contract. On the contrary, the policy specifically negatives this. 14 R. C. L., 934. The terms of the policy not only fail to put the defendant on notice that he was accepting a policy in a company which was subject to assessments under the laws of the State of New York, but failed in anywise to suggest that the company issuing the policy was an assessment company at all." (R 96).

The defense set up by these defendants therefore to the effect that they were not made members of this association, must be determined in accordance with applicable state law, and there is no Federal question here presented. *Fairport, Painesville & Eastern Railroad Company vs. Meredith*, 292 U. S., 589, 78 Law Ed., 1447.

We see no Federal question involved in this case. Otherwise, however, should there be any Non-Federal question involved which would support the ruling of the Georgia Supreme Court, the latter's ruling upon such Non-Federal questions would be conclusive of the matter and the case would not be reviewable. As said by the United States Supreme Court in *Fox Film Corporation vs. Muller*, 296 U. S., 207:

"The construction put upon the contract did not constitute a preliminary step which simply had the effect of bringing forward for determination the Federal question, but was a decision which automatically took the Federal question out of the case if otherwise it would be there. The Non-Federal question in respect of the construction of the contract and the Federal question in respect of their validity under the Anti-Trust Act were clearly independent of one another. The case in effect was disposed of before the Federal question said to be involved was reached. The decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear."

Applying the foregoing principles to the case at bar, it appears that since under the decision of the Georgia Supreme Court the policies of insurance issued in Georgia did not make the policyholders a member of the New York Association, it becomes unnecessary for this court to decide what would have been the rights of the parties had the insurance contracts made the policyholders members of the Association.

It is immaterial whether the public policy of Georgia requiring insurance contracts to be written in the face of the policy are based upon statute law, common law, or elements of public policy as announced by the courts. See *Pennsylvania Railroad Company vs. William Hughes*, 191 U. S., 478, 48 *Law Edition*, 269, where the court said (Headnote 2):

"The highest court of the state may administer the common law according to its own understanding and interpretation, without liability to a re-

view in the Federal Supreme Court, unless some right, title, immunity, or privilege, the creation of the Federal power, has been asserted and denied."

On page 491 of the above decision this court pointed out that the requirements of the particular state involved would be the same "whether enacted into a statute or resulting from the rules of law enforced in the State courts."

The granting of the writ in this case would necessarily mean that this court had consented to review a decision of the Georgia Supreme Court holding that, under the laws of Georgia, the printed matter on the back of the insurance policies in question was insufficient to constitute the policyholders a member of the Insurance Association involved, and we respectfully submit that that question is entirely a question involving the laws and policies of the State of Georgia regulating the issuance of insurance policies, and construing such insurance policies when issued.

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**CLERK**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1941.**

**No. 48.**

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**LOUIS H. PINK, Superintendent of Insurance of the  
State of New York,  
Petitioner,**

**vs.**

**A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as  
ADAMS TRANSFER COMPANY, H. L. BASS, as BASS BUS  
LINE, ATLANTA MACON MOTOR EXPRESS, INC., COX  
BROS. COMPANY, CONTINENTAL CARRIERS, INC., KALER  
PRODUCE CO., SOUTHEASTERN MOTOR LINES, INC.,  
Respondents.**

---

**On Writ of Certiorari to the Supreme Court of the  
State of Georgia.**

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**BRIEF OF RESPONDENTS.**

---

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# **SUPREME COURT OF THE UNITED STATES.**

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PRODUCE CO., SOUTHEASTERN MOTOR LINES, INC.,  
Respondents.

---

On Writ of Certiorari to the Supreme Court of the  
State of Georgia.

---

## **BRIEF OF RESPONDENTS.**

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### **I.**

#### **FULL FAITH AND CREDIT NOT DENIED PETITIONER; THIS COURT SHOULD DECLINE JURISDICTION.**

The petitioner cites the failure of the Supreme Court of Georgia to enforce against respondents the assessment orders and decrees of the Supreme Court of New York

as being a denial of full faith and credit due to judgments of a sister state under guaranty of Article IV, Section 1, of the Constitution of the United States. The Master's report in the New York proceedings relied on by petitioner clearly holds that the assessment fixed in the New York courts does not have the binding effect of a judgment as against nonresident policyholders. In Re: **Auto Mutual Indemnity Company**, 14 N. Y. S. (2nd) 601. Headnote 16 reads as follows:

"Where non-resident policyholders of insolvent mutual automobile casualty company had not been served with process within the jurisdiction and had not appeared generally in filing objections to jurisdiction of trial court to order them to show cause why an assessment should not be paid, a personal judgment for payment of assessment would not be ordered against such policyholders although they were bound by the finding of necessity for the assessment and amount thereof."

The opinion under paragraph 16 reads as follows:

"These rules of law are equally applicable in the case of policyholders in a mutual insurance company. Accordingly no personal judgment will be ordered against non-resident members or policyholders who have not appeared generally or been served personally with process within the State, although, as hereinabove set forth, they are bound by the finding of the necessity for the assessment and the amount thereof."

We deem it unnecessary to cite more than one authority to the effect that a person is not bound by the judgment of a court where the requirements of "due process" of law have not been accorded to him. **Pennoyer v. Neff**, 95 U. S. 733. It is not contended on the part of petitioner that these respondents were served in the New York proceedings. Therefore, there is no decree or judgment of the New York courts to be given full faith and credit. In its

opinion, under review here, the Georgia Supreme Court says (R. 90):

“That before that constitutional provision (full faith and credit clause) can become operative, one must have had his day in court; and over against it we place the other guaranty, to wit, the due process clause; and it is of the essence of due process that one must be given an opportunity to be heard.”

This court in the case of **Wisconsin v. Pelican Insurance Company**, 127 U. S. 471, 32 L. Ed. 239, examined carefully the requirements of full faith and credit as to judgments of sister states. It is held that Article IV, Section 1, of the Constitution establishes a rule of evidence rather than of jurisdiction and that it does not affect the jurisdiction either of the court in which the judgment is rendered or of the court in which it is offered in evidence.

In the case of **Bagley v. General Fire Extinguisher Company**, 53 L. Ed. 605, 212 U. S. 477, this court discusses the full faith and credit contention as regards a Michigan judgment. The decision rules:

“The defendant was no party to that judgment and there is nothing in the constitution to give it any force as against strangers.”

The court holds further (this being also applicable in our case):

“Even if wrong, it did not deny the Michigan judgments their full effect, but **denied the preliminary relation between the defendant and the party to them.**”

In the case at bar the sole question is the interpretation of an insurance contract. It has been held by this court:

“It is manifest that the question of the proper construction of this contract being non Federal in its

nature, is not subject to review and we consequently assume that the construction was correct."

**Commercial Publishing Company v. Samuel C. Beckwith**, 188 U. S. 567, 47 L. Ed. 598.

As enunciated by the Supreme Court of Georgia, the full faith and credit clause of the Constitution must be construed in connection with the due process of law provision of the same. It has been many times held that due process of law is denied by the action of a state court in according full faith and credit to a judgment in personam by a court of a sister state against a nonresident who was not personally served. **Old Wayne Mutual Life Association v. Sarah McDonough**, 204 U. S., page 8, 51 L. Ed., page 345. See, also, **Burton O. Wetmore v. James L. Karrick**, 205 U. S. 141, and 51 L. Ed. 745.

The Supreme Court of Georgia, applying applicable, Statutory Law of Georgia, construed the policy issued to these respondents to be, according to its terms, nonassessable. This construction cannot be enlarged by giving extra-territorial effect to the New York statutes. In this connection we would refer the court to the case of **Pacific Employer's Insurance Company v. Industrial Accident Commission of California**, 306 U. S. 493, 83 L. Ed. 943.

## II.

### **THE ACTION IS NOT AN ACTION FOR UNPAID PREMIUMS.**

On page 2 of his brief opposing counsel submits that this action sought to recover assessments, and also unpaid premiums. The Supreme Court of Georgia evidently construed the petition to seek recovery only of assessments, and plaintiff's petition seems to justify that construction. Paragraph 15 of plaintiff's petition as amended (R. 19)

shows that petitioner was seeking to sustain the joinder of parties defendant upon the basis of assessments. It does not appear that unpaid premiums were even alleged against a great many of the defendants.

Neither does it appear that the matter of recovery of premiums was urged before the Supreme Court of Georgia until after its decision had been rendered, petitioner then complaining of it in his motion for a rehearing, which is supposed to cover only matters urged before the court and overlooked by it.

That the petition sought to recover assessments only we think appears from a reference to the following paragraphs of plaintiff's petition: Paragraph six (R. 8), Paragraph eight (R. 8), Paragraph nine (R. 9), Paragraph fourteen (R. 10), and Paragraph fifteen of the amended petition (R. 19).

The prayers of plaintiff's petition (R. 18) do not mention premiums, nor do the prayers of the amended petition (R. 19).

Neither do we find any specific statement that the account based on unpaid premiums was "correct, past due and unpaid."

### III.

#### **THE SOLE QUESTION INVOLVED.**

Counsel for petitioner, in his very comprehensive brief, quotes from many cases, of this and other courts, to support certain principles of law which neither respondent nor the Supreme Court of Georgia in this case has ever questioned.

We call particular attention to the outstanding princi-



ple upon which all are agreed, to wit: The courts of Georgia are bound by the decisions and decrees of the New York courts regarding the necessity for, and amounts of, assessments to be levied **against those who may be liable for assessments.**

It is equally clear, however, that such judgments by the courts of New York do not adjudicate the liability of any defendant for such assessments, as is clearly pointed out in a large number of cases cited by the Supreme Court of Georgia. (See R. 88, Division Two of Court's opinion.)

The sole and controlling question in the case is this: Did defendant policyholders, by the mere acceptance of the insurance policy issued to them in Georgia in the form of an ordinary insurance contract, knowingly and voluntarily become members of Auto Mutual Indemnity Company of New York, so as to become liable for the assessments provided for by the statutes of New York and the charter and by-laws of said company?

To put the question in another way, it might be stated as follows: Does the statute law of New York enter into an ordinary insurance contract made in Georgia so as to create the membership relation which under the New York law carries with it the liability to assessment, or must that relation be first created by the conventional act of the parties, whereupon the members become bound by the laws of New York defining their liability?

We submit that the question here raised is of major importance. Opposing counsel insist that the mere acceptance by any person in Georgia of any type of a policy issued by a mutual insurance company of New York of itself rendered such person a member of the association and therefore liable to assessments.

We submit that this question is entirely new. No case

cited by opposing counsel (excepting those involved in this same liquidation) is analogous to the situation here under discussion for the reason that in all of the cases cited the party against whom liability was claimed, at the time of accepting his policy or benefit certificate, had knowledge, actual or constructive, of the fact that he was becoming a member of a mutual association or benefit society, and none of the cases cited involved the mere acceptance of an ordinary standard insurance policy.

That this case involves a new question is easily demonstrated by a careful study of the decisions upon which opposing counsel admittedly and primarily rely.

In the case of **Supreme Council of Royal Arcanum v. Green**, 237 U. S. 531, it appears that the Massachusetts courts construed the charter of a local mutual benefit society, but the New York courts failed to give full faith and credit to such judgment. The question was not there raised as to whether the holder of the certificate became a member of the association. On the other hand, the court stated in part:

“Said Green, the defendant in error, made application to become, and was admitted as, a member of this council,”

and it appears that his application made express reference to “the laws of the order,” he therein agreeing “to conform in all respects to the laws, rules and usages of the order now in force, or which may hereafter be adopted by the same.” See page 235. The certificate issued to him likewise recited that he should comply “with the laws, rules and regulations” of the order.

The foregoing is typical of all those cases involving fraternal orders, where it does not admit of doubt that a member has knowledge of the fact of his membership.

In the case of **Sovereign Camp W. O. W. v. Bolin**, 305 U. S. 65, it appeared that Bolin joined a Missouri lodge "and received a certificate of membership," which made certain recitals, and received a certificate which recited "that it was issued subject to all the conditions named in the constitution and laws of the fraternity." The Supreme Court of Nebraska held a certain by-law of the society to be void, and this court, through Mr. Justice Roberts, ruled that the decision of the Nebraska courts upholding the by-laws was binding upon the Missouri courts. We agree thoroughly with opposing counsel as to the unsoundness of the Missouri decisions there under review.

Mr. Justice Roberts made this statement:

"Entry into membership of an incorporated beneficiary society **is more than a contract**, it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation."

This court said that the Missouri courts were not at liberty to disregard the fundamental law and "**turn a membership beneficiary certificate into an old-line policy** to be construed and enforced according to the law of the forum."

The foregoing language is significant. We submit that it is equally as improper for any court to attempt to **turn an old-line policy into a beneficiary certificate**, and thereby subject the purchaser of the same to liabilities of which he had no notice, as to "turn a membership beneficiary certificate into an old-line policy."

The case of **Chandler v. Peketz**, 297 U. S. 609, involved the liability of a stockholder in a Minnesota corporation under a statute of that state imposing assessment liability on stockholders. The Receiver of the corporation sued in Colorado, where the defendant demurred to the petition,

claiming that the action of the Minnesota courts was not binding on him. This court reiterated the principle that "one against whom the order of assessment is sought to be enforced is not precluded from showing that he is not a stockholder," but it is pointed out **that no such defense was there asserted.**

In the case of **Broderick v. Rosner**, 294 U. S. 629, a New York statute imposed a certain liability upon stockholders in New York banks, but a New Jersey statute virtually prevented the bringing of a suit in New Jersey by the New York Receiver upon such liability. This court said in part:

"The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York as to such incorporation."

This court also said:

"Obviously recognition could not be accorded to a local policy of New Jersey, if there really were one, of enabling all residents of the state to escape from the provisions of a **voluntarily assumed statutory obligation**, consistent with morality, to contribute to the payment of the depositors of a bank of another state of which they were stockholders." See 294 U. S., page 644.

We wish here to point out that cases involving the purchaser of stock in a corporation are not controlling in a case such as this, in so far as the question of the **personal liability** of the defendant is concerned. A stockholder is in all cases one of the owners of the corporation and one of the persons controlling its operations through directors and officers. The purchaser of stock must take cognizance of the fact that there is a charter for the corporation in the state named, and that the laws of such

state and the charter granted pursuant to such laws impose obligations upon the stockholders. Likewise, a person signing an application to, and joining, a fraternal order knows that he is becoming a member and knows that he will be subject to the same rules and liabilities that govern the other members.

In the instant case the parties sought to be charged did nothing but purchase an ordinary standard insurance policy.

We find no decided case where the policyholder is sought to be subjected to liability because of the mere acceptance of such a policy. We have found no decision which cannot be easily and readily distinguished upon its facts from the case at bar. That group of cases involving fraternal orders invariably discloses that the party sought to be assessed had knowledge, both actual or constructive, or both, of the fact of his membership and in practically every case expressly assumed the obligations of such membership. As pointed out above, the defendants in this case do not occupy the status of a stockholder in a corporation, neither do they occupy the status of a person **accepting what purports to be a mutual assessment policy.**

The real point is this: The particular policy here under consideration was not sufficient to render the person receiving it a member. The Georgia Supreme Court did not express any doubt as to the resulting liability of Georgia policyholders, if they had become members of the New York Insurance Association. Did the acceptance of this particular policy by a person in the State of Georgia, without more, constitute such policyholder a member? We submit that it did not.

IV.

**THESE DEFENDANTS DID NOT UNDER THEIR CONTRACTS BECOME MEMBERS OF THE ALLEGED MUTUAL INSURANCE COMPANY.**

It is necessary to observe the distinction between such a mutual casualty insurance company, as the Auto Mutual Indemnity Company, and various types of co-operative associations, fraternal orders, lodges, benefit associations and like associations which operate on the assessment plan. The Auto Mutual Indemnity Company does not operate on **an assessment plan**. Its policies are issued on a fixed premium in the same manner as other liability policies are issued. With this distinction kept in mind we feel that the decisions may be reconciled.

In **Section 250**, of his work on Insurance, Mr. Couch points out that mutual insurance companies may be divided into two classes, one class doing an insurance business, the other class being mutual societies or associations which have a social, benevolent, or like character, but whose prevalent purpose is that of insurance. In **Section 251**, the Author states:

“And in New York a mutual company may issue policies for a fixed cash premium without liability upon the part of the insured to contribute further. In fact, the more generally accepted rule seems to be that the fact that cash premiums are paid, without further liability, is perfectly consistent with the mutual principle, but there is authority to the effect that where the premiums are paid wholly in cash, that is, where the policies are issued on a **cash premium basis**, the insured does not become a member of the insurer society or corporation, and in such a case the plan is not that of mutual insurance.”

Speaking of the distinction between mutual companies

and benefit societies and whether or not they are insurance companies the same author says in **Section 253**:

“Thus it has been said that the question must be determined by the language of the **contract** and the character of the business **transacted regardless of any name by which it is called and whatever** may be the association's name.”

In Section 588, under the Title “**Assessments and Dues**” the Author states:

“Likewise, the questions whether, or to what extent, assessments are debts, depends entirely upon the nature of the organization and **the entire contract between the parties.**”

In Section 590, it is stated:

“And, according to an Illinois decision, where a mutual benefit company accepted cash for the premium, the insured did not become a member, and sustained to it **no different relations than he would have sustained to a stock company.**”

In Section 592, it is stated:

“Again, an assignee is not liable to assessments **where he has not agreed to become a member, and is under no contract to assume the liabilities of the assignor to the company, or to pay assessments.**”

In Section 595, the following is stated:

“The plans or schemes of mutual and fraternal insurance are so many and different, and the contracts so variant, that no more definite rule can be formulated for determining when and how an assessment may be levied than the general one **that the terms of the contract, when valid, must govern in all cases.**”

In Section 595 (a) it is stated:

“An assessment cannot be validly made unless the necessity therefor properly and legally arises within the contemplation **of the contract** therefor, since it is



**upon such conditions** that the members have promised to contribute.”

The case of **Craig v. Western Life Insurance Company**, 116 S. W. 1113, holds as follows:

“The right of an assessment life insurance company to assess its policyholders is **strictly construed** and it can only be exercised when the conditions prescribed **in the contract of insurance** exist. Members of a mutual insurance company cannot be assessed to pay demands **for which their contracts do not make them responsible.**”

This principle is recognized in New York in the case of **Beha v. Weinstock**, 160 N. E., page 17, which says:

“Every member \* \* \* shall be liable for his proportionate part of any assessment laid by his corporation in accordance with law **and his contract.**”

We recognize, of course, that in many cases the terms of the insurance contracts are such as to make applicable the statutes of foreign states and the charters and by-laws of the company.

The principle (as applying to stockholders) is well expressed in 23 **Harvard Law Review**, at page 38, in the following language:

“In nature, nevertheless, this liability is a hybrid. It has both contractual and statutory features, and yet it is neither contractual nor statutory. It is incidental to membership in the corporation. It is imposed, irrespective of either knowledge or conscious assent, on all who become stockholders. **On the other hand, no person can be made a stockholder without his own consent. No one, therefore, becomes subject to this liability unless he voluntarily becomes a member of the corporation.** This assent creates the contractual element of the liability, bringing it within the protection of the constitutional prohibition in regard to impairing the obligation of contracts.”

In passing, and touching upon the question of the stockholders' consent, we call attention to the fact that certain provisions of the New York Insurance Laws requiring the policy to contain provisions for assessments were violated by Auto Mutual Indemnity Company, and such provisions were intentionally or unintentionally omitted from the policy. We refer to Section 346 of the New York Insurance Laws, reading as follows:

**"The Corporation shall in its by-laws and policies fix the contingent mutual liability of the members for the payment of losses and expenses not provided for by its admitted assets."**

V.

**THE NATURE OF THE POLICY ISSUED DID NOT CONSTITUTE THE POLICYHOLDERS AS MEMBERS.**

We invite a very careful reading of the policy (R. 48). At the top of the face of the policy appear the words "Auto Mutual Indemnity Company, New York, New York." The policy bears all the earmarks of a standard insurance policy, the insurer being referred to as "The Company" and the policyholder being referred to as "The Insured," and it will be noted that the word "Insured" is used sixty-three (63) times and the word "Company" forty-two (42) times in the face of the policy.

At no place in the policy is it stated that Auto Mutual Indemnity Company is "a mutual insurance company established under the laws of New York," the closest approach to the above being the words "a mutual insurance company."

Condition 11 refers to the annual premium, and Condition 15 reads as follows:

**"By acceptance of this policy the named insured**

agrees \* \* \* that this policy embodies all agreements existing between itself and the company or any of its agents relating to this insurance."

The most casual reading of this policy in its entirety would cause even an insurance expert to conclude that it was nothing but an ordinary standard commercial old-line policy with a flat premium. Condition No. 14 points out to the policyholder that he may participate in dividends, but omits any reference to assessments. No reference to membership is made in the face of the policy. A vague reference is contained in fine print on the back of the policy in the statement that the holder of it "is entitled to vote either in person or by proxy at any and all meetings of said company." Reference is made in this printed matter on the back to "the contingent liability of the named assured under this policy," but even there no mention is made of any liability by the assured as a member.

While we will subsequently discuss the matter printed on the back of the policy, we submit that the matter contained in the face of the policy does not constitute the policyholder a member. The closest approach to anything constituting the policyholder a member would be the language in the policy, "a mutual insurance company, herein called the Company." That language, however, does not under the decided cases make a person accepting the policy a member of the company and thereby subject to assessment.

## VI.

### **EFFECT OF THE WORD "MUTUAL" IN THE POLICY.**

The Supreme Court of Georgia and this court naturally take cognizance of the fact that there are in this country a great many mutual companies whose policies are not

assessable, for example, Penn Mutual Life Insurance Company and others. The court will also take cognizance of the fact that many mutual companies pay losses only out of funds paid in by the policyholders without any liability for assessment against them, and that Mutual Companies have capital assets contributed by organizers or subscribers.

In their brief, on page 6, opposing counsel state:

“The mutual nature of the company appears from its name, from the profit-sharing provisions in the base of the policy and on the back of the policy is a specific recitation, etc.”

We call attention to the fact that profit-sharing provisions are equally applicable to nonassessable policies, it being common knowledge that millions of policyholders receive dividends upon all types of insurance policies, whether assessable or not. The question of the recitals on the back of the policy are elsewhere covered in this brief, it being definitely established in Georgia and in most other jurisdictions that recitals on the back of the policy do not constitute a part of it (See R. 95, Decision of Georgia Court). The question therefore narrows itself down as to whether as contended, “the mutual nature of the company appears from its name,” and to go one step further, “Does the mere word ‘mutual’ in the name of the company, without more, render its policyholders liable to assessment?” We submit that more than the mere mutual nature of the company is required, and that the policyholder must be charged with knowledge that the company is a mutual assessment company, and that the policy issued renders the policyholder liable to assessment.

VII.

**THE POLICY HAVING BEEN ISSUED IN DIRECT  
VIOLATION OF LAWS OF NEW YORK, THE  
POLICYHOLDER CANNOT BE HELD  
LIABLE FOR ASSESSMENT.**

As above pointed out, Section 346 of the New York Insurance Laws (See R. 9, 10, 44) definitely provides that such a corporation "shall in its by-laws **and policies** fix the contingent mutual liability of the members." It also provides that assessments, even those levied by the Superintendent of Insurance in case of liquidation, "shall be for no greater amount than that specified in the policy or by-laws." The law contemplated that assessments should be recited not only in the by-laws but in the policies, and the assessments should be no greater than that specified in one or the other, which of course means that, although the by-laws might authorize a specified assessment, the policy could provide a smaller amount than authorized by the by-laws.

The question arises as to the legal effect of policies issued in Georgia in direct violation of the laws of New York. Shall the penalty be inflicted upon the innocent purchaser of the policy in Georgia, or upon the company in New York?

The rule is well settled by the courts of this country, including those of New York State, that:

"The court will, under certain circumstances, relieve a party to a contract which the other party was prohibited by statutes from making."

See **Irwin v. Currie**, Court of Appeals of New York, 64 N. E., page 161, and citations.

In citing another New York case, the court in the case above cited, said:

“In that case the court reached a conclusion that while the other party to the contract with the bank was a party to a contract made in violation of statute, nevertheless it was not equally culpable with the bank, and therefore was entitled to the assistance of the court to relieve it.”

The court said also:

“We have preferred to rest our decision upon the broader ground that this defendant cannot invoke his violation of law for the purpose of retaining monies which he agreed plaintiff should have, and but for which agreement would have come into defendant's possession.”

In the instant case, can the New York insurance company unlawfully omit all reference to assessments from its policies, sell them to innocent purchasers in other states, and then recover upon the basis of the policies being assessable?

In a case involving an insurance policy issued by a mutual company where the terms of the policy are inconsistent with the by-laws the Supreme Court of Maine in the case of **Greenlaw v. Aroostook County Patrons Mutual Fire Insurance Company**, 105 Atl. Rep. 116, stated:

“The tender and delivery by it of the several policies was tantamount to a declaration in relation to each that there were no by-laws inconsistent with their terms.”

The fact that the company might be a mutual company does not prevent estoppel being urged against it. **New York Life Insurance Company v. Street**, 265 S. W., p. 97.

VIII.

**THE LIQUIDATOR HAS NO GREATER RIGHT TO  
RECOVER AGAINST POLICYHOLDERS THAN  
THE COMPANY HAD PRIOR TO LIQUIDATION.**

That the foregoing statement is correct would seem to be self-evident. The Liquidator took over the affairs of the corporation and stood in the shoes of the Board of Directors. He cannot enforce an assessment liability which they themselves could not have enforced. The New York courts have conceded the above to be a correct statement in a decision involving the same insurance laws as are involved in the instant case.

In the case of **Beha, Superintendent, v. Breger**, 223 N. Y. Supp. 726, the court said in part:

“The fact that there has been a liquidation of the corporation, and that the affairs are in the hands of a public officer or representative of the court, cannot in and of itself create a liability against a policyholder **contrary to his contract.**”

The same principle is stated in the case of **Blackwell v. Mutual Reserve Fund Life Association** (N. C.), 53 S. E. 833, 834-835:

“The liability of the members of the mutual insurance companies upon their premium notes is not increased by reason of the insolvency of the corporation and the appointment of a receiver, since the receiver is merely substituted in place of the directors of the company and vested with their rights and nothing more.”



IX.

**RESPONDENTS ARE BOUND ONLY BY POLICY  
PROVISIONS IN FACE OF POLICY.**

It should be borne in mind that the policy issued to the defendants at no place in its face mentions or refers to assessment liability. The vague reference (R. 48) to "contingent liability" on the back of the policy is not a part of the policy. Section 56-213, Annotated Code of Georgia, requires all contracts of insurance to be evidenced by a policy of insurance in writing, print, or both. The rights of the parties are stated in that section to be governed by the terms, stipulations and conditions appearing on the face of the policy. There are several other code sections requiring that insurance policies be in writing. These sections 56-811 and 56-904 relate to fire and life insurance companies. However, they indicate a definite public policy requiring that insurance contracts be in writing. Similarly, statutory enactments indicate a policy of the Georgia law to require that assessments be plainly set forth in the policy contract. See Section 56-313 and Section 56-1502, Annotated Code of Georgia. These sections relate to fire and fraternal associations. The decisions of the Appellate Courts of Georgia amply indicate a public policy of requiring that the entire contract be in writing.

**Northwestern National Insurance Company v. Southern States Phosphate Company**, 20 Ga. App. 506 (Headnote 4);

**Electric City Lumber Company v. New York Underwriters Insurance Company**, 43 App. 355.  
A Ga.

In a very recent case Judge Sibley of the Fifth Circuit Court of Appeals held:

"In Georgia by statute a contract of fire insurance must be in writing, Ga. Code Section 56-801, and this

is apparently true of other contracts of insurance. Section 56-213. The contract must be wholly in writing and not partly in parol." See cases cited. **D. G. Jacobs v. Merchants Assurance Corporation of New York**, 99 Fed. (2nd) 655.

The plaintiff in this case is proceeding on a policy issued in direct violation of Section 346 of the statutes of New York above set forth. It was issued contrary to the laws of New York and to the laws of Georgia if the Company intended that it be an assessable policy. Neither in the face of the policy nor on the back of the policy is any reference made to the charter or by-laws of the Company or to any liability for assessment.

The case of **Dwindell v. Kramer**, 92 N. W. 227, involves such a similar statement of facts to those involved here that we refer the court to that case in its entirety. In that case the contract refers to the applicable law, by-laws and application, which are made a part of this contract. The court held that the policyholder in such company is liable to assessment—

"For losses not simply in accordance with law, but in accordance with his contract. Any such company may fix the contingent mutual liability of its policyholder not merely by its by-laws, but by its policies and the total amount of the liability of the policyholder **shall be plainly and legibly stated in the face of each policy.**"

"We accordingly hold that the defendants are not liable upon this policy contingently or otherwise in any amount in excess of the cash premium therein named."

The petitioner here would control the obligations, rights, powers and duties of respondents by the very nature of the insurance company. This contention is answered in the

case of **Baker v. Sovereign Camp W. O. W.**, 116 S. W. 513,<sup>20</sup>  
in which it is said that:

“It was the character of the insurance and not the insurer that determined what defenses could be made.”

In that case it was held that the Missouri courts were not required under the full faith and credit clause of the Constitution to follow a Nebraska Supreme Court decision construing an old-line policy to be a fraternal insurance policy.

## X.

### **THE RULINGS OF THE SUPREME COURT OF GEORGIA CONSTRUING A CONTRACT MADE IN THE STATE OF GEORGIA ARE BINDING AND FINAL.**

We wish to quote to the court from the case of **Wilhelm v. Security Benefit Association**, 104 S. W. (2nd) 1042:

“Defendant contends that if it is held in Missouri to be liable as an old-line company when the certificate is recognized in Kansas, the home of the corporation, to comply with the fraternal insurance laws of that state, it would be violative of Section 1, Article IV, of the Constitution of the United States. That clause has been stretched by judicial interpretation to apply to a variety of peculiar situations, but we have been referred to no judicial decision holding that it permits the State of Kansas to prescribe the form of insurance contracts that may be sold in Missouri.

“It is equally frivolous to argue that a decision holding defendant liable as an old-line company on this particular policy is equivalent to destroying its entity as a fraternal company.”

We call to the attention of the Court the case of **Pink**

**v. Georgia Stages, Inc.**, 35 Fed. Supp. 437. This case involves the identical question here under discussion. The court in a well-reasoned and amply supported opinion declined to enforce the assessment against a defendant in that case identical in position with the defendants here.

In holding that the defendants did not become members of the New York corporation the Georgia court did not define or decide the legal incidents of membership. Admittedly the incidents of membership are controlled by the New York law, and the interpretation of the New York law by the New York courts. Nor did it invade the province of the New York law or courts to the extent of dealing with the distribution of the assets of the New York corporation in liquidation. To have done either in disregard of the New York laws and court proceedings would have violated the Federal Constitution, and would have raised the Federal Question upon which this court has taken jurisdiction.

Its decision was narrowly confined to the holding that the act of making an ordinary insurance contract in Georgia, which states that it embodies all agreements existing between the parties, does not constitute the insured a member of the New York insurance corporation in the absence of notice to that effect contained in the contract, and that the liability to assessment which is an incident of membership does not attach merely by reason of the acceptance of the policy.

Since the defendants did not become members merely by accepting the insurance policies in Georgia, and since they did not otherwise contract to become liable to assessment, they cannot be assessed.

In construing and determining the effect of the Georgia contract, as distinguished from the consequences of mem-

bership, the Georgia Supreme Court was dealing with a question within its sole and final jurisdiction. The Federal question urged by appellant simply is not in the case.

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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**Supreme Court of the United States**

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**OCTOBER TERM, 1941**

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**No. 48**

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**LOUIS H. PINK, Superintendent of Insurance  
of the State of New York,  
*Petitioner,***

**v.**

**A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as  
ADAMS TRANSFER CO., H. L. BASS, as BASS  
BUS LINE, et al.,**

***Respondents.***

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF GEORGIA.**

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**MOTION FOR REHEARING ON BEHALF OF  
PETITIONER**

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# Supreme Court of the United States

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OCTOBER TERM, 1941

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No. 48

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LOUIS H. PINK, Superintendent of Insurance  
of the State of New York,  
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A. A. A. HIGHWAY EXPRESS, INC., H. A. ADAMS, Trading as  
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*Respondents.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF GEORGIA.

---

## MOTION FOR REHEARING ON BEHALF OF PETITIONER

Comes now the above named LOUIS H. PINK, Superintendent of Insurance of the State of New York, petitioner, and presents this his petition for rehearing of the decision in this case.

### I.

The opinion of this Court was announced December 8, 1941. This petition is filed within less than twenty-five days thereafter, under Rule 33 (28 USCA, Sec. 354).

## II.

### REASONS FOR PETITION FOR REHEARING.

Petitioner sued for assessments, and other indebtedness—unpaid premium balances (R. 11). All relief was denied on the merits. The court below (R. 81) specifically overruled all objections based on misjoinder of parties and causes of action. *The denial of the right to collect premiums was specifically assigned as error in the petition for certiorari* (Section III (2), p. 10), *and this error has not been considered by this Court.*

## III.

### THE CONTROLLING QUESTION.

The controlling question, therefore is this: The recovery of premiums logically follows from the decision of the Court in this case. The obligation to pay premiums is not and cannot be contested. It is one of the stipulations of the policy, and this Court, while limiting the obligations of the respondents to the stipulations of the policy, recognizes that Georgia "must be denied authority to adjudicate the meaning and domestic effect under its own laws of a contract entered into by its own inhabitants and containing no stipulation that they should be bound by obligations extrinsically imposed by New York law." Whether the liability for premiums be measured by the liability of members for other indebtedness (New York Insurance Law, Sec. 423, [R. 30]), or whether it be based upon the contractual obligation of each respondent to pay the premiums severally due by them on their policies, the result is the same. They received insurance protection; they should pay the stipulated premiums.

Respondents reside in Georgia. Unless their property be found elsewhere, access to the courts of Georgia is necessary to collect these obligations. The effect of a judgment closing

the Courts of Georgia to the grant of such relief clearly violates the rights guaranteed to petitioner by the Constitution of the United States, set forth in his petition for certiorari.

The public policy of Georgia does not protect its residents from paying premiums when sued by the Superintendent of Insurance of the State of New York, as liquidator of an insolvent insurance company.

*Mell, Trustee, v. McNulty*, 185 Ga. 343.

The right to recover premiums was based on the New York statute (Sec. 423, R. 30, *supra*), hence the jurisdiction of the Court is clear.

The respondents had the benefit of performance. The premiums sued for are for terms which expired November 10, 1937, the date of insolvency, or earlier (R. 11-14).

*"The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which the doctrine rests. It is only because of the dominant public interest that one who, like respondent, has had the benefit of performance by the other party, will be permitted to avoid his own promise."* (Emphasis ours).

*Twin City Pipe Line Co., v. Harding Glass Co.*,  
283 U. S. 353, at 356,357.

Surely there is no public interest which requires the affirmation of judgments granting to residents of Georgia immunity from their contractual liability to pay premiums for insurance protection which they received.

The Company was admitted to do business in Georgia without limitation.

*"\* \* \* every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."*

*Relfe v. Rundle*, 103 U. S. 222.

*O'Malley, Supt. v. Wilson*, 182 Ga. 97.

IV.

The necessary consequence of becoming a policyholder is the assumption of a liability to pay premiums. The effect of the decision denying recovery of premiums is to hold that the policies are void, but neither the opinion of the court below nor of this Court rests on such ground. If it is intended to affirm the opinion below for this reason, a clear statement to this effect should be made in order that other rights of the parties may not be clouded.

V.

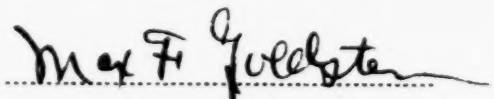
For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; that upon further consideration the decision of this Court be vacated and a different decision entered, recognizing the rights herein prayed for.

  
MAX F. GOLDSTEIN

ALFRED C. BENNETT

*Attorneys for Petitioners.*

I, MAX F. GOLDSTEIN, Counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.



# SUPREME COURT OF THE UNITED STATES.

No. 48.—OCTOBER TERM, 1941.

Louis H. Pink, Superintendent of Insurance of the State of New York,  
Petitioner,

vs.

A. A. Highway Express, Inc., H.  
A. Adams, trading as Adams Transfer Co., et al.

On Writ of Certiorari to  
the Supreme Court of  
the State of Georgia.

[December 8, 1941.]

Mr. Chief Justice STONE delivered the opinion of the Court.

Petitioner, as Superintendent of Insurance of the State of New York, is the statutory liquidator of Auto Mutual Indemnity Company, an insolvent mutual insurance company, organized under the laws of New York. He brought this suit in the Superior Court of Georgia against respondents, who are residents of Georgia and policyholders in the company, to recover assessments alleged to be due by virtue of their membership in it. The Supreme Court of Georgia affirmed the judgment of the trial court, dismissing the petition on demurrers of the several respondents. 191 Ga. 502. We granted certiorari, 313 U. S. 555, because of the asserted denial by Georgia of full faith and credit to certain statutes and judicial proceedings in New York, under which the assessment was levied.

The relevant facts set out in the amended petition are as follows: The Indemnity Company, organized in 1932 under Article 10-B of the New York Insurance Law, was, on application of the Superintendent of Insurance, placed in liquidation by order of the New York Supreme Court on November 24, 1937. Upon further proceedings, pursuant to § 422 of the New York Insurance Law, the court ordered, August 12, 1938, that each member of the Indemnity Company, during the year prior to November 10, 1937, should pay assessments in specified amounts aggregating 40% of premiums earned by the Company during that year. The order directed that the members show cause on a specified date why they should not be

held liable to pay and why the Superintendent should not have judgment for such assessments. Pursuant to § 422 and the order, the Superintendent mailed notice of the order to each policyholder, including respondents. None of respondents entered an appearance. It is alleged that all "were policyholders and members of the Company" during the year mentioned; that at the time when each purchased his policy and became a member there was in force § 346 of the New York Insurance Law, which under New York statutes and judicial decisions became a part of the insurance contract, binding upon each policyholder. Section 346 provides that every mutual insurance company "shall in its by-laws and policies fix the contingent mutual liability of the members for the payment of losses and expenses not provided for by its admitted assets" to a specified extent, and that "all assessments, whether levied by the board of directors, by the Superintendent of Insurance in the liquidation of the corporation, or otherwise, shall be for no greater amount than that specified in the policy and by-laws". It is further alleged that the assessment made against respondents was for their pro rata share of the 40% assessment levied by order of the court pursuant to the statutes of New York and the by-laws of the company, and was confirmed as to members, including respondents, by the order of November 17, 1938. The form of policy acquired by respondents is by reference made a part of the petition.

The Supreme Court of Georgia, construing the amended petition as a whole, took its averment that respondents "were policyholders and members of the company" to mean that they were members because they were policyholders. That construction has not been challenged and we adopt it here. The court accepted the allegations of the meaning and effect of the New York statutes and judicial decisions as correct, but held that respondents, none of whom was made a party to the New York proceedings by service of process, were not concluded by the New York orders and statutes on the question whether their relation as policyholders to the company was such as to subject them to liability.

Examining the contract embodied in the policies, the court found that although the name of the company contained the word "mutual" the contracts of insurance were without any term or provision purporting to make the policyholder a member of a mutual company or to subject him to assessment. Each policy provided that the insured agrees that it "embodies all agreements existing between him-

self and the company or any of its agents relating to this insurance." Printed on the back of each policy but not referred to in the contract was a "Notice to policyholders" that "the insured is hereby notified that by virtue of this policy he is a member of the Auto Mutual Indemnity Company", and that "the contingent liability of the named insured under this policy shall be limited to one year from the expiration or cancellation hereof and shall not exceed the limits provided by the Insurance Law of the State of New York", there being on the face of the policy no reference to any contingent liability or assessment or to any law providing for such. The petition does not make it clear where the policies were delivered to respondents, and the court held that in the absence of a showing to the contrary they were governed by Georgia law.

Applying to this state of facts the law and policy of Georgia derived from its statutes and judicial decisions, the court held that the relation between the insured and the company was that of contract, that the whole contract was embodied in the stipulations appearing on the face of the policy, and that it did not by its provisions make respondents members of the company or subject them to assessment in accordance with the laws of New York or otherwise. Petitioner challenges the judgment on the ground that it fails to accord to the New York orders and statutes the full faith and credit to which they are entitled under Article IV, § 1 of the Constitution.

While urging in brief and argument that all those who are shown to be members of the Indemnity Company are bound by the New York adjudication as to the necessity for and amount of the assessment, petitioner does not specifically urge that the New York proceedings have established the personal liability of respondents for the assessments which have been ordered. He could not well do so for the proceeding in the New York courts to determine what judgments should be entered against the policyholders, including nonresidents, and the judgments actually entered, do not appear to have been made a part of the present record. See *In re Auto Mutual Indemnity Co.*, 14 N. Y. S. 2d 601. In any case it suffices for present purposes to say that New York does not attribute any such effect to the judgments of her courts rendered against absent nonresident defendants. See *Kittredge v. Grannis*, 244 N. Y. 182, 192-96; *Geary v. Geary*, 272 N. Y. 390,



398; cf. *Pope v. Heckscher*, 266 N. Y. 114; *Hood v. Guaranty Trust Co.*, 270 N. Y. 17. Such was the ruling in the New York proceeding for the liquidation of the Indemnity Company with which we are here concerned. See *In re Auto Mutual Indemnity Co.*, *supra*, 611, where the referee's opinion states: ". . . no personal judgment will be ordered against non-resident members or policyholders who have not appeared generally or been served personally with process within the State, although, as hereinabove set forth, they are bound by the finding of the necessity for the assessment and the amount thereof."

It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the state of its organization, although they are not made parties to the proceeding for levying it. *Hawkins v. Glenn*, 131 U. S. 319; *Hancock National Bank v. Farnum*, 176 U. S. 640; *Bernheimer v. Converse*, 206 U. S. 516; *Converse v. Hamilton*, 224 U. S. 243, 260; *Selig v. Hamilton*, 234 U. S. 652; *Marin v. Augedahl*, 247 U. S. 142; *Broderick v. Rosner*, 294 U. S. 629; *Chandler v. Peketz*, 297 U. S. 609. Whether we support these legal consequences by reference to consent of the stockholder or to his assumption of a corporate relationship subject to the regulatory power of the state of incorporation, in either case the procedure conforms to accepted principles, involves no want of due process, and is entitled to full faith and credit so far as the necessity and amount of the assessment are concerned. See *Christopher v. Brusselback*, 302 U. S. 500, and cases cited. The like principle has been consistently applied to mutual insurance associations, where the fact that the policyholders were members was not contested. *Royal Arcanum v. Green*, 237 U. S. 531; *Modern Woodmen v. Mixer*, 267 U. S. 544. The Supreme Court of Georgia found it unnecessary to consider the application of these authorities to the present case, since it decided that respondents, by acquiring the particular form of policy issued by the Indemnity Company, did not become members of it.

It is evident that if the constitutional authority of the Indemnity Company to stand in judgment for its absent members turns on their consent or their assumption of membership in the Company, respondents, who were not parties to the New York proceedings, may defend on the ground that they never became members because they have done no act signifying such consent or assumption.

After an assessment has been lawfully levied on the members of a corporation, it is still open to any who were not parties to the assessment proceeding to defend on the ground that they never became stockholders. *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 336-37; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 423; *Royal Arcanum v. Green*, 237 U. S. 531, 544; *Chandler v. Peketz*, 297 U. S. 609, 611; cf. *Hawkins v. Glenn*, 131 U. S. 319, 335. Ordinarily this means no more than that they have not acquired or owned stock in the corporation during the relevant period. For a necessary consequence of becoming a stockholder is the assumption of those obligations which, by the laws governing the organization and management of the corporation, attach to stock ownership.

Other considerations may be significant in determining whether a membership in a mutual insurance company has been effected through acquisition of a policy. A mere contract is not a share of stock and when made with a corporation or association does not necessarily connote membership in it. A policy of insurance may be a contract whose terms purport to define completely the relationship and obligations of the parties. Here the policy, which was on its face a contract and nothing more, stipulated only for obligations to be performed by the insurer upon payment of the prescribed premium. The policy's stipulations contained no provision making the insured a member of the association or subjecting him to liability for assessment as such. Although the company was denominated "mutual", that term does not necessarily signify that policyholders are members or subject to assessment.

Without the command of some constitutionally controlling statute, the Georgia court was free to interpret the obligation of the policy as limited to those stipulations expressed on its face and as excluding any stipulation for membership or for liability to assessment which the contract did not mention. Petitioner finds such a command in the New York statutes which he asserts make all policyholders liable to assessment without the aid of any stipulation to that effect in the policy. He relies on the full faith and credit clause to exact obedience to the statutes.

Every state has authority under the Constitution to establish laws through both its judicial and its legislative arms, which are controlling upon its inhabitants and domestic affairs. When it is demanded in the domestic forum that the operation of those laws

be supplanted by the statute of another state, that forum is not bound, apart from the full faith and credit clause, to yield to the demand, and the law of neither can, by its own force, determine the choice of law for the other. *Milwaukee County v. White Co.*, 296 U. S. 268, 272; *Pacific Ins. Co. v. Commission*, 306 U. S. 493, 500; *Kryger v. Wilson*, 242 U. S. 171, 176; *Union Trust Co. v. Grosman*, 245 U. S. 412; *Griffin v. McCoach*, 313 U. S. 498.

To the extent that Georgia must give full faith and credit to the New York statutes and judicial proceedings, it must be denied authority to adjudicate the meaning and domestic effect under its own laws of a contract entered into by its own inhabitants and containing no stipulation that they should be bound by obligations extrinsically imposed by New York law. But the full faith and credit clause is not an inexorable and unqualified command. It leaves some scope for state control within its borders of affairs which are peculiarly its own. This Court has often recognized that, consistent with the appropriate application of the full faith and credit clause, there are limits to the extent to which the laws and policy of one state may be subordinated to those of another. *Alaska Packers Assn. v. Commission*, 294 U. S. 532; *Pacific Ins. Co. v. Commission*, 306 U. S. 493; *Klaxon Co. v. Stentor Co.*, 313 U. S. 487, 497-98; see *Milwaukee County v. White Co.*, 296 U. S. 268, 273.

It was the purpose of that provision to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others. But the very nature of the federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means for compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others. When such conflict of interest arises it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another. See *Alaska Packers Assn. v. Commission*, 294 U. S. 532, 547; *Pacific Ins. Co. v. Commission*, 306 U. S. 493.

Where a resident of one state has by stipulation or stock ownership become a member of a corporation or association of another, the state of his residence may have no such domestic interest in

preventing him from fulfilling the obligations of membership as would admit of a restricted application of the full faith and credit clause. But it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject.

Without the aid of agreement or consent, the laws of the state of organization can be imposed on Georgia courts and policyholders only so far as the full faith and credit clause compels it. The undue extension of the statutes and authority of a state beyond its own borders by the expedient of rendering a judgment against non-citizens over whose persons or property the state has acquired jurisdiction, may infringe due process. *Home Ins. Co. v. Dick*, 281 U. S. 397. Like, but more cogent, reasons may call for the restriction of the full faith and credit clause as the instrument for controlling the law and policy of one state, with respect to its domestic affairs, by the statutory command of another.

The interpretation and legal effect of policies of insurance entered into by the inhabitants of Georgia, who are sued upon them in its courts, are peculiarly matters of local concern. *Griffin v. McCoach*, 313 U. S. 498. Were it not for the New York statute, there could be no question of Georgia's authority to adjudicate the rights and obligations arising under the policies. And as we have seen, the only basis for the imposition by New York of its command on the Georgia court and policyholders is the assumption by the latter of membership in the New York company. But this, in the circumstances of this case, depends upon the meaning and effect of all the provisions appearing on the policies with respect to the assumption of membership, which is for Georgia to determine. There being no question of evasion of constitutional obligation, we accept that determination as one of domestic law and policy which the full faith and credit clause does not override.

*Affirmed.*

A true copy.

Test :

*Clerk, Supreme Court, U. S.*